Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

THOMAS L. ENGLISH, ESQ.,

Petitioner,

v.

HONORABLE MARTHA VAZQUEZ, U.S. DISTRICT JUDGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an attorney can demonstrate injury sufficient to satisfy the standing requirements of Article III of the Constitution for an appeal, when a judge enters a final, written order containing findings of misconduct against the attorney.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	1
Statement of the Case	2
Statement of the Facts	3
I. Introduction	3
II. Proceedings in the Underlying Criminal Case	4
A. District Court's Harsh, Written Censures of Mr. English	4
1. Court's June 1997 Order	4
2. Order on Reconsideration	5

Contents

Page

B. The Tenth Circuit Accepts the District Court's Findings of Censure Against Mr. English 7

III. Proceedings on Remand 8

A. The Supreme Court of New Mexico's Disciplinary Board Does Not Accept the Harsh Findings of Censure and Mr. English is Completely Exonerated after a Thorough Hearing 8

B. District Court Praises Mr. English in Sealed Hearing 10

C. Court Enters Order again Harshly Censuring Mr. English 11

D. Court of Appeals Proceedings 13

Reasons for Granting the Petition 14

A. The Majority View is to Allow Sanctioned Attorneys to Appeal 15

B. One Minority View Allows Appeals in Certain Instances 18

C. Another minority view does not allow appeals at all 20

Contents

Page

D. Published Findings of Attorney Misconduct Create a Legally Cognizable Injury Conferring Standing Under Article III of the Constitution 21

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 21

Barringer v. Ind. Sch. Dist, No. 1-89 of Oklahoma County, Oklahoma Bd. of Educ., 532 U.S. 1020 (2001) 2

Bolte v. Home Ins. Co., 744 F.2d 572 (7th Cir. 1984) 20

Butler v. Biocore Med. Tech.., Inc., No. 00-3181 (10th Cir. Nov. 4, 2003) 15, 16

Cannon v. Williams, 525 U.S. 1123 (1999) 2

Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817 (7th Cir. 1992) 15

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 21

Duke Power Co. v. Caroline Environmental Study Group, 438 U.S. 59 (1978) 23

FDIC v. Tefken Construction and Installation Co., 847 F.2d 440 (7th Cir. 1998) 21

Greer v. Kane, 159 U.S. 1042 (1996) 2

In re Snyder, 472 U.S. 634 (1985) 22

Cited Authorities

	Page
In re Williams, 156 F.3d 86 (1st Cir. 1998)	2, 15
Johnson v. Board of County Commissioners for County of Fremont 85 F.3d 489 (10th Cir. 1996)	2
Martin v. Brown, 63 F.3d 1252 (3d Cir. 1995)	22
McBryde v. Committee to Review Circuit Council Conduct and Disabilities Orders of the Judicial Conference of the United States, 264, F.3d 52 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 821 (2002)	2
Precision Specialty Metals, Inc., v. United States, 315 F.3d 1346 (Fed. Cir. 2003)	15, 16
Sullivan v. Committee on Admissions and Grievances, 385 F.2d 954 (D.C. Cir. 1967)	15, 18
Thomas v. Capital Security Servs. Inc., 836 F.2d 866 (5th Cir. 1988)	22
United States v. Gonzales, 164 F.3d 1285 (10th Cir. 1999)	7
United States v. Gonzales, 344 F.3d 1037 (10th Cir. 2003)	8
United States v. Modica, 663 F.2d 1173 (2d Cir. 1981)	24

Cited Authorities

Page

United States v. Seltzer, 227 F.3d 36 (2d Cir. 2000) 22

United States v. Students Challenging Regulatory Authority Procedures, 412 U.S. 669 (1973) 23

United States v. Talao, 222 F.3d 1133 (9th Cir. 2000) 15, 18, 19

Walker v. City of Mesquite, 129 F.3d 831 (5th Cir. 1997) 15, 17, 18

Weeks v. Ind. Sch. Dist.,230 F.3d 1201 (105h Cir. 2000) 2

Weissman v. Quail Lodge, Inc., 179 F.3d 1194 (9th Cir. 1999) 15

Williams v. United States, 156 F.3d 86 (1st Cir. 1998) 19

Williams v. United States, 158 F.3d 50 (1st Cir. 1998) 2

UNITED STATES CONSTITUTION

Article III ..... i, 21

Cited Authorities

Page

STATUTES

28 U.S.C. § 1291 ..... 1, 14

OTHER AUTHORITIES

ABA Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 cmt. (1994) 2

Thomas E. Baker, "The Inherent Power to Impose Sanctions: How a Federal Judge is Like an 800-Pound Gorilla," *The Review of Litigation*, No. 1 (1994) 23

NMSA 1978, Rule 16-303 9

NMSA 1978, Rule 16-303(A) 19

NMSA 1978, Rule 16-304 19

NMSA 1978, Rule 16-401 19

NMSA 1978, Rule 16-804(C) 22

NMSA 1978, Rule 17-206(A) 22

United States Attorney's Manual at 1-4.100, *Allegations of Misconduct by Department of Justice Employees* 22

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Tenth Circuit Dated And Filed April 29, 2003 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of New Mexico Dated June 3, 2001 ... 46a

Appendix C — Order Of The United States District Court For The District Of New Mexico Dated April 18, 2001 ..... 52a

Appendix D — Order Of The United States Court Of Appeals For The Tenth Circuit Denying Petition For Rehearing Dated And Filed August 20, 2003 ..... 57a

Petitioner Thomas L. English respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 344 F.3d 1036 (10th Cir. 2003). (App. A). The June 3, 2001 opinion of the district court denying reconsideration of its April 18, 2001 order is at App. B. The April 18, 2001 order of the district court is at App. C.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 29, 2003. (App. A). The order of the court of appeals denying the petition for rehearing and suggestion for rehearing *en banc* was entered on August 20, 2003. (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The general appellate jurisdictional statute provides as follows in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

28 U.S.C. § 1291.

STATEMENT OF THE CASE

This case presents an important and fundamental question of procedural fairness: whether an attorney has standing to appeal findings of misconduct entered against him by a court in a written order. The right to appeal an adverse determination has long been recognized as "a fundamental element of procedural fairness as generally understood in this country." ABA Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 cmt. at 18 (1994). However, the right of appeal enjoyed by litigants has frequently been denied to their counsel when counsel's reputation has been damaged by adverse findings in a court order.

This question of whether a court of appeals has jurisdiction to hear an appeal from an attorney who is the subject of a published judicial rebuke has split a panel of the Tenth Circuit Court of Appeals. It has divided the United States Courts of Appeals. It has also been the subject of multiple prior petitions for writ of certiorari to this Court. *See, e.g., McBryde v. Committee to Review Circuit Council Conduct and Disabilities Orders of the Judicial Conference of the United States*, 264 F.3d 52 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 821 (2002); *Weeks v. Ind. Sch. Dist.*, 230 F.3d 1201 (10th Cir. 2000), *cert. denied, Barringer v. Ind. Sch. Dist. No. I-89 of Oklahoma County, Oklahoma Bd. of Educ.*, 532 U.S. 1020 (2001); *In re Williams*, 156 F.3d 86 (1st Cir. 1998); *Williams v. United States*, 158 F.3d 50 (1st Cir. 1998) (denial of petition for rehearing *en banc*), *cert denied, Cannon v. Williams*, 525 U.S. 1123 (1999); *Johnson v. Board of County Commissioners for County of Fremont*, 85 F.3d 489 (10th Cir. 1996), *cert denied, Greer v. Kane*, 519 U.S. 1042 (1996). Respectfully, it is ripe for this Court's determination.

STATEMENT OF THE FACTS

I. Introduction

Thomas L. English was the lead federal prosecutor in charge of a complex criminal prosecution of a violent drug gang in New Mexico. The defendants eventually pled guilty to various criminal charges. The defense strategy throughout the case included repeatedly accusing the United States, generally, and Mr. English, specifically, of prosecutorial misconduct, and continuously seeking access to cooperating government witnesses, many of whom were harassed or threatened throughout the case.

After sustained defense attorney allegations of misconduct, Mr. English was eventually sanctioned by the District Court in written opinions. Those findings were upheld by the Tenth Circuit Court of Appeals and a variety of potential sanctions suggested. Through a confluence of factors which are set forth below, Mr. English was only able to seek redress of those findings, in his personal capacity, well after the damage had been done to his reputation.[1]

Subsequently, one of the defense attorneys filed a disciplinary complaint against Mr. English, one of the remedies that had been contemplated by the Tenth Circuit.

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1. The Department of Justice eventually acknowledged an inherent conflict between the interests of the Department and those of Mr. English personally, and appointed private counsel to represent Mr. English's personal interests. Unfortunately, the slow process leading to that appointment resulted in Mr. English receiving personal representation only after the district court and the United States Court of Appeals for the Tenth Circuit had made damaging adverse findings against him.

The Supreme Court of New Mexico, which administers matters of attorney discipline, on a full record, exonerated Mr. English. This was the first opportunity that Mr. English had ever had to present his personal defense to the allegations cast against him by defense counsel.

Despite exoneration by the Disciplinary Board of the Supreme Court of New Mexico, the district court subsequently re-entered censures against Mr. English in two written opinions rendered after the conclusion of the underlying criminal case.

Mr. English sought redress by appealing those new findings to the Tenth Circuit.[2] A split panel of that Court dismissed the appeal, finding that Mr. English had not shown injury sufficient to invoke federal jurisdiction. The dissent disagreed, arguing that Mr. English had sufficiently demonstrated harm to warrant the Tenth Circuit's full consideration of the appeal. The Tenth Circuit also denied Mr. English's Petition for Rehearing En Banc. This petition followed.

II. Proceedings in the Underlying Criminal Case

A. District Court's Harsh, Written Censures of Mr. English

1. Court's June 1997 Order

During the course of the criminal case, defense attorneys eventually filed a motion to dismiss various indictment counts as a sanction for the use of an allegedly unlawful bench warrant issued by a state court judge to coerce the testimony

2. Mr. English also filed concurrently a Writ of Coram Nobis, seeking to overturn the Tenth Circuit's findings against him in the earlier appeal. The Tenth Circuit summarily denied the Writ.

of a witness. The district court found the arrest warrant to be unconstitutional. In that opinion, the district court also found that Mr. English had misled it during prior hearings about whether the witness, Angela Tello was "under the control" of the United States, during prior hearings. The court added that the government had repeatedly violated its discovery orders. Without holding a hearing, the court concluded that the defendants' constitutional rights had been violated because the United States had coerced the statements of Ms. Tello and excluded her as a witness.

The United States moved for reconsideration, primarily defending the state court's warrant as fully compliant with the Constitution. The motion (authored by another Assistant U.S. Attorney) provided an extremely limited defense of Mr. English's statements to the Court in various hearings. Mr. English was not allowed to counter the personal attacks against him, as the United States feared he would become a witness in the proceedings, and consequently unable to prosecute the case.

2. Order on Reconsideration

Reconsidering its order, the district court held a hearing and heard testimony from witnesses, though not Mr. English, on the issues surrounding the government's contact with the witness, Angela Tello. The Court ultimately denied reconsideration in a 119 page memorandum opinion. In that tome, the Court expanded upon its original findings of government misconduct, severely criticizing the government's handling of Ms. Tello. The Court concluded that the government had exercised extreme coercion in dealing with her and that her cooperation with the government was involuntary. The Court relying solely upon the testimony

of one of the defense lawyers, found that Mr. English improperly had directed the witness to contact the defense lawyer to tell him that "she did not want to speak to the defense representatives."[3] The court further found that English had "threatened [the defense lawyer] with criminal charges should he continue to attempt to contact [the witness]." The court concluded that Mr. English had violated a prior order directing the government to provide defense access to witnesses, by coercing the witness to refuse to speak with the defense. Despite the fact that the district court itself truncated the discussion about the witness during hearings, it again criticized Mr. English for misleading it during prior hearings. The Court also reiterated its prior findings that the state court arrest warrant was unconstitutional.

Mr. English was neither permitted to submit an affidavit with facts important to his conduct nor testify in his defense because the government feared that, by doing so, Mr. English would become a witness and be unable to continue as lead counsel. Even though the district court sanctioned Mr. English personally, the court expressed that it did not even need to hear his version of what had happened, stating that "[T]he Court did not deem his testimony essential . . . his affidavit is hereby considered withdrawn and the Court will not consider" it.

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3. This finding contradicted the district court's own repeated prior admonitions to defense counsel that Ms. Tello voluntarily had chosen not to speak with defense counsel. Transcript of January 28, 1997 Hearing at 52-53 (Judge Vazquez) ("Ms. Tello is not someone that was willing to speak with you under any circumstances. . . . She just simply does not want to talk to you, and she is under no legal obligation to do so.") *Id.* at 52-53.

B. The Tenth Circuit Accepts the District Court's Findings of Censure Against Mr. English

The United States appealed, though again not focusing on Mr. English's interests. On appeal the Tenth Circuit reversed in part, affirmed in part, and remanded. *Gonzales*, 164 F.3d at 1288-91. The Court reversed suppression of the witness' testimony but found that the district court properly invoked its "supervisory power" to punish "government misconduct." The Tenth Circuit upheld findings of the district court that Mr. English: (1) instructed the witness to tell the defense that she did not want to speak with them; (2) "threatened defense team members with prosecution"; and (3) misrepresented the witness' status to the district court. The Court also made a fact finding of its own, not made by the district court, which was derived from assertions made in defense affidavits, that Mr. English failed to produce an arrest warrant for Angela Tello to the defense prior to her deposition, then expressed flippantly at the end of the deposition, "Look, here it was with my notes all along." *Id.* at 1289, 1292.

The Tenth Circuit remanded for consideration of lesser sanctions other than outright suppression of Ms. Tello's testimony, including: "allowing the witness to be redeposed by defense at government expense, censuring or fining the government attorneys involved in the misconduct, or recommending disciplinary proceedings against the government attorneys involved." *Id.* at 1293.

The United States moved for rehearing. In its petition, the United States argued that the Tenth Circuit had relied upon inaccurate facts in finding that Mr. English had committed misconduct, and requested that the Tenth Circuit

remove Mr. English's name from its opinion, citing the Courts of Appeals' traditional practices. The petition was summarily denied.

Mr. English filed a pro se Motion for Leave to Intervene, or for Leave to Appear as Amicus, to argue his personal case before the Tenth Circuit. Mr. English argued that he: (1) had not been a party in proceedings before the district court; (2) had no notice that he would be personally sanctioned; (3) was not represented by counsel; and (4) was unable to fully defend his professional reputation. The Tenth Circuit denied Mr. English's pro se motion.

The Court therefore upheld these findings of censure even though a persistent conflict of interest existed between the government's interest in its prosecution and Mr. English's interest in defending his professional reputation which prevented Mr. English from presenting his side of the story; and neither the District Court nor the Tenth Circuit had sought to hear Mr. English's *personal* position and defense to the charges leveled against him prior to entering censures against him.

III. Proceedings on Remand

A. The Supreme Court of New Mexico's Disciplinary Board Does Not Accept the Harsh Findings of Censure and Mr. English is Completely Exonerated after a Thorough Hearing

On remand, the Supreme Court of New Mexico, through its Disciplinary Board, investigated Mr. English's conduct. Disciplinary Board Opinion appended to *United States v. Gonzales*, 344 F.3d 1037 (10th Cir. 2003). This was

Mr. English's first opportunity to present fully his personal case before an investigatory body. The Board conducted a thorough investigation in which it interviewed numerous witnesses under oath, received reams of documents and heard Mr. English's sworn testimony. At the conclusion, the Board issued a letter opinion, holding that Mr. English had committed no misconduct.

The Bar first found that Mr. English had a good faith belief that Ms. Tello was not "under his 'control'" when he made pertinent statements to the district court in September 1996 and January 1997. The Bar concluded that "there is no evidence that Mr. English made knowing misrepresentations to the court." *Id.* at 3; *see also* Rule 16-303 Comment to Model Rules (lawyer may properly make statement to court "when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.").

The Bar next concluded that Mr. English had not barred defense access to Ms. Tello. Instead, it found that: (1) Ms. Tello had adamantly expressed that she did not want to speak with the defense under any circumstances; and (2) Mr. English had relayed this information to the defense but had not obstructed access to Ms. Tello. The Bar concluded that Mr. English had not threatened the defense lawyer with prosecution, "but was merely relaying the concerns of witnesses and attempting to get the problem stopped." *Id.* at 4.

The Bar found that Mr. English was not dilatory in complying with discovery orders, but rather was doing the best job that he could in a case of unprecedented complexity. *Id.* at 5-6. "Under the circumstances of this case, it would seem that Mr. English did as much as was humanly possible

to comply with the court's discovery orders and facilitate the exchange of information." *Id.* at 6.

Finally, the Bar found no evidence of improper conduct by Mr. English with respect to the circumstances surrounding Ms. Tello's deposition. *Id.* at 1-2. The Bar swiftly rejected the defense assertions in affidavits that Mr. English had failed to provide the arrest warrant and affidavit for Ms. Tello prior to her deposition, noting that defense assertions were not supported by the record. *Id.* at 1-2 (emphasis added). Having taken into account all of the evidence in the case, some of which Mr. English had not previously had the opportunity to present, the Disciplinary Board, the only body with complete information about the facts of the matters, fully exonerated Mr. English.

B. District Court Praises Mr. English in Sealed Hearing

After the completion of the Bar investigation, on January 26, 2001, the district court convened a hearing in Mr. English's personal case, purporting to determine what further sanctions, if any, should be imposed upon Mr. English. At the time of the hearing, all defendants in the criminal case had pled guilty and were sentenced. April 18, 2001 Order at 4.

At the hearing, Mr. English submitted to the district court reams of documents, including the favorable findings of the State Bar and requested findings and conclusions. The defense attorneys appeared at the hearing and repeatedly represented that they were not seeking sanctions to be imposed on Mr. English.

At the conclusion of the hearing, the district court praised Mr. English. The court indicated that the United States had been fortunate to have him on the case. Realizing the harm already visited upon Mr. English, the court assured him that no more sanctions would issue. Transcript of January 26, 2001 Hearing, at 21 ("It is not my intention to cause you any other hardships with regard to your professional background.") and 24 ("This has gone far enough. . . . There will be no further sanctions imposed in this matter.").

C. Court Enters Order again Harshly Censuring Mr. English

The parties then submitted a straightforward stipulated order reflecting the Court's oral ruling that no fine, censure of any kind or other sanction is appropriate against any of the government attorneys involved in this matter.

The district court ignored the stipulated order submitted by the parties and entered an order which again severely chastised Mr. English. The Court's words censured him, despite its prior expressed intent to impose "no further sanctions."

The order made several harmful findings including that:

> (1) lead government counsel (Mr. English) made misrepresentations "in open court . . . that interfered with Defendants' court-ordered access to Ms. Tello";
>
> (2) the government (Mr. English)[4] knowingly and

4. References in the order to the "government" could only mean Mr. English, as his conduct was the only matter before the Court, as per the Court's sealed notices.

> intentionally violated discovery orders and misrepresented Ms. Tello's status and whereabouts to the court and defense counsel";
>
> (3) the government (Mr. English) lost sight of his oath to do justice: "The Government's focus should not be to win at all costs, but to advance integrity and fairness in our legal system"; and
>
> (4) Mr. English committed misconduct in the case for which he deserved to suffer consequences: "The Assistant United States Attorney has been before the State Disciplinary Board for his conduct in this case, and has suffered the consequences of his conduct in his community of fellow prosecutors as well as in the defense community. The Court trusts that the Government has learned from this experience, and in future cases will use its power not simply to gain the best advantage. . . ."

Appendix C.

Mr. English moved the Court to reconsider its order, which the Court denied on June 3, 2001.[5] In the June Order

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5. The timing of the order was extremely damaging to Mr. English. He was one of four candidates submitted by U.S. Senator Pete Domenici, (R-N.M.) to the White House for consideration for appointment as the next United States Attorney. Mr. English's nomination to be United States Attorney was the culmination of a lifetime of public service, and was widely publicized. A public censure in April 2001–during his consideration for appointment as U.S. Attorney–was the most damaging sanction that the Court could have visited upon him.

the Court concluded that it had not "sanctioned" Mr. English in its April 2001 order, but instead "simply reiterate[d] the background of the case, stating previous findings that were made about the Government's conduct. . . ." *Id.* at 2. The Court believed it had not imposed "new sanctions or . . . new findings." *Id.* at 3. The Court emphasized that it had never "mentioned the individuals [sanctioned] by name in any opinion." *Id.*[6]

Mr. English appealed these new findings–in his personal capacity–to the Tenth Circuit. He also filed a Writ of Coram Nobis, attacking the prior adverse findings of the District Court and Tenth Circuit. Mr. English had been unable previously to appeal those findings, in his personal capacity, during the pendency of the criminal case.

D. Court of Appeals Proceedings

The Tenth Circuit summarily denied the Writ of Coram Nobis. In so doing, the Court denied Mr. English the opportunity to contest the district court's and Tenth Circuit's prior findings of misconduct against him.

Mr. English also appealed the district court's latest orders sanctioning him. The appeal split the three-judge panel. The majority dismissed, finding that Mr. English lacked standing. The majority first concluded that "[t]here is no doubt that the order from which English seeks to appeal is

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6. This is, respectfully, incorrect. The district court repeatedly mentioned Mr. English by name throughout the case in sanctioning him, specifically in reference to his statements regarding Angela Tello. *See, e.g.*, June 1997 Order at 19-21 ("Mr. English's assertions . . . are less than accurate."); July 1997 Order at 77 ("Mr. English's comments to the Court were misleading.").

'final' for purposes of 28 U.S.C. § 1291, and that English's appeal is post-judgment." The majority determined, however, that the district court's orders did not "rise to the level of a sanction," and hence Mr. English had "nothing from which to appeal." Finding Mr. English had not been legally "injured" by the court's orders, the majority concluded he lacked standing to appeal.

Judge Baldock, dissenting, agreed with the majority that, if Mr. English was not sanctioned, he had suffered no injury and therefore lacked standing to appeal. However, he disagreed that Mr. English had not been sanctioned, and forcefully argued that "the district court's orders constituted a sanction sufficiently injurious to give Attorney English standing to appeal."

A petition for rehearing, and suggestion for rehearing en banc was timely filed. The petition was denied. Judge Baldock would have granted the petition.

REASONS FOR GRANTING THE PETITION

The question whether, and under what circumstances, attorneys have standing to appeal written findings of misconduct entered against them in court orders has been resolved quite differently in the past, depending upon the Circuit in which an attorney has been practicing, and from time to time, when the Circuit considered the appeal. In similar circumstances, some attorneys have been allowed appeals, while others have not. It is ironic that the profession charged with protecting due process rights has not achieved a fair standard for itself in this area. This Court should grant certiorari to resolve a conflict between the United States Courts of Appeals and to accord members of the bar fundamental fairness.

Currently, the Courts of Appeals utilize three approaches in determining whether a court's written decision finding attorney misconduct, but not specifically imposing any type of sanctions is appealable. The Fifth, Federal and District of Columbia Circuits, joined very recently by the Tenth Circuit, have held that attorneys have standing to appeal orders finding that they had committed misconduct, *Walker v. City of Mesquite*, 129 F.3d 831, 832-33 (5th Cir. 1997); *Sullivan v. Committee on Admissions and Grievances*, 385 F.2d 954 (D.C. Cir. 1967); *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346 (Fed. Cir. 2003); *Butler v. Biocore Med. Tech., Inc.*, No. 00-3181 (10th Cir. Nov. 4, 2003). The Ninth and First Circuits hold that attorneys may appeal findings of misconduct against them in certain circumstances. *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1199 (9th Cir. 1999) (formal finding of violation of ethical rule is appealable); *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000) (attorneys may appeal orders that are "inordinately injurious to a lawyer's reputation" but does not allow appeals from orders that are properly considered "routine judicial commentary") and *In re Williams*, 156 F.3d 86, 92 (1st Cir. 1998) (only judicial statements identified as sanctions or reprimands are appealable). The Seventh Circuit has held that attorneys lack standing to appeal findings of misconduct against them in court orders, *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992).

A. The Majority View is to Allow Sanctioned Attorneys to Appeal

The majority view is to allow sanctioned attorneys the opportunity to appeal. This view has been adopted by the Federal, D.C., Fifth Circuit Courts of Appeals, and now, after Mr. English's appeal was decided and his petition for rehearing and rehearing *en banc* denied, the Tenth Circuit.

In *Butler v. Biocore Med. Tech., Inc.*, No. 00-3181 (10th Cir. Nov. 4, 2003), the Tenth Circuit addressed the question specifically reserved in Mr. English's case, whether a written order which neither expressly identifies itself as a reprimand nor imposes any sanction which nonetheless finds an attorney to have committed ethical violations, imposes a legally sufficient injury to support appellate jurisdiction. The Tenth Circuit adopted the view that attorneys have standing to appeal findings of misconduct against them, even if the findings are not specifically labeled as a reprimand.[7] In adopting a standard denied to Mr. English, the Tenth Circuit has specifically ratified the view espoused by Judge Baldock in his dissent in this case.

Butler follows the majority, but by no means unanimous approach of the Courts of Appeals finding attorney misconduct, but not imposing other sanctions, to be appealable. In *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346 (Fed. Cir. 2003), a Department of Justice attorney sought review of a ruling by the United States Court of International Trade reprimanding her for misquoting judicial opinions in a brief. In an unpublished opinion, the court found that the attorney had "intentionally or negligently misled" it, in violation of Rule 11 and "formally reprimanded" the attorney. The court determined not to impose monetary sanctions because it concluded that the unpublished reprimand would be a sufficient deterrent sanction.

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7. Mr. English filed a Motion with the Court for leave to refile his Petition for Rehearing En Banc, in light of this new case. The Tenth Circuit denied the Motion on November 17, 2003.

On these facts, the Federal Circuit determined that it had jurisdiction to review the Court of International Trade's formal reprimand of the attorney. The Court concluded that the reprimand was explicit and formal and imposed as a sanction for what the court determined to be a violation of Rule 11. The Federal Circuit concurred with those circuits that

> have pointed out [that] a judicial reprimand is likely to have a serious adverse impact upon a lawyer's professional reputation and career. A lawyer's reputation is one of his most important assets. Indeed, such a reprimand may have a more serious adverse impact upon a lawyer than the imposition of a monetary sanction. The trial court's formal reprimand of [the attorney] had a sufficiently direct impact upon her that she should be able immediately to obtain appellate review of that action.

Id. at 1353.

The Fifth Circuit reached a similar conclusion in *Walker v. City of Mesquite*, 129 F.2d 831 (5th Cir. 1997). There, the district court had found that an attorney engaged in "blatant misconduct" by violating his obligation of candor to the court. Like here, the district court levied no other sanction against the attorney. The Fifth Circuit, however, rejected the notion that an attorney's diminished reputation was not a cognizable injury sufficient to give standing to appeal. The Court noted that the attorney had been sternly reprimanded and found guilty of blatant misconduct. The reprimand, the Court concluded, "must be seen as a blot on [the attorney's] professional record with a potential to limit his advancement

in government service and impair his entering into otherwise inviting private practice." *Id.* at 832. The Court held that "the importance of an attorney's professional reputation, and the imperative to defend it when necessary obviates the need for a finding of monetary liability or other punishment as a requisite for appeal of a court order finding professional misconduct." *Id.* 832-33.

In a case very similar to the instant one, the D.C. Circuit also held that a written order finding that an attorney violated ethical rules, but not imposing sanctions, constituted an appealable injury. *Sullivan v. Committee on Admissions and Grievances*, 385 F.2d 954 (D.C. Cir. 1967) (Burger, J.). As in the case at bar, "the District Court concluded for appropriate reasons not to impose sanctions in this case. However, the District Court . . . determined that [the attorney] was guilty of proscribed conduct and this determination plainly reflect[ed] adversely on his professional reputation."

B. One Minority View Allows Appeals in Certain Instances

The First and Ninth Circuit Courts of Appeals have adopted a "hybrid" approach, allowing an attorney to appeal in certain circumstances.

In *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000), the district court found that an Assistant United States Attorney (AUSA) had violated California's ethical rule regarding contact with represented parties. The court stated that it would refer the AUSA's conduct to the State Bar, and instruct the jury accordingly when the matter came to trial. The AUSA appealed the finding that she acted unethically. The United States sought a writ of mandamus prohibiting

the court's proposed jury instruction. The Ninth Circuit found that because the district court had made a formal finding and reached a legal conclusion that the AUSA knowingly and wilfully violated a specific rule of ethical conduct, the finding constituted a sanction:

> The district court's disposition bears a greater resemblance to a reprimand than to a comment merely critical of inappropriate attorney behavior. A reprimand generally carries with it a degree of formality. The requisite formality in this case is apparent from the fact that the trial court found a violation of a particular ethical rule, as opposed to generally expressing its disapproval of a lawyer's behavior. . . . If the court's formal finding is permitted to stand, it is likely to stigmatize [the AUSA] among her colleagues and potentially could have a serious detrimental effect on her career. In addition, she might be subjected to further disciplinary action by the California Bar. We have no reluctance in concluding that the district court's finding of an ethical violation by [the AUSA] is an appealable sanction.

Id. at 1138.[8]

The First Circuit considered the question of whether a "trial court's published findings of attorney misconduct were independently appealable in *Williams v. United States*, 156 F.3d 86 (1st Cir. 1998); *rehearing en banc denied by*

8. While the district court did not specifically cite to potentially applicable New Mexico disciplinary rules, its orders can be interpreted to charge Mr. English with violating NMRA 16-303(A), 16-304, and/or 16-401.

4-4 vote, 158 F.3d 50 (1st Cir. 1998) (dissenting opinion). In that case, a bankruptcy court judge imposed monetary sanctions against two government attorneys personally. On reconsideration, it vacated the monetary award against one of the attorneys. On appeal to the district court, the monetary award against the other was annulled, but declined to vacate the bankruptcy court's factual criticisms of the attorneys during the course of its opinion. The First Circuit determined that it did not have jurisdiction to hear the attorneys' appeal, holding that an appeal could only be taken if the comments made were expressly identified as a reprimand. The dissent denounced that view as unduly formalistic.

C. Another minority view does not allow appeals at all.

The Seventh Circuit has concluded that attorneys lack standing to appeal findings of misconduct. The lead, representative case is *Bolte v. Home Ins. Co.*, 744 F.2d 572 (7th Cir. 1984). There, the district court had found that two insurance defense attorneys had concealed a witness' identity and statements. The court described their conduct as "reprehensible", but imposed no "formal" sanction on them. The attorneys appealed.

The Seventh Circuit dismissed the attorneys' appeal finding that the district court's order was not "final." It held that Congress did not mean "to allow people who were not even parties to a lawsuit in the district court to appeal from a wounding or critical or even palpably injurious comment or finding by a district judge." *Id.* at 573.

Accordingly, there are three different approaches across the Courts of Appeals to allowing attorneys to appeal findings

of misconduct. Not only does the result vary by what Circuit one practices in, perversely, it also may vary in the same Circuit, depending upon when one's appeal is heard. In this very case, Mr. English's appeal was dismissed over vigorous dissent. Thereafter, too late for Mr. English, the Tenth Circuit adopted the view of the dissent and allowed a different attorney to appeal findings of misconduct against him. This may occur in other Circuits as well. This Court should announce a uniform rule to prevent this injustice in the future.

D. Published Findings of Attorney Misconduct Create a Legally Cognizable Injury Conferring Standing Under Article III of the Constitution

In order to meet Article III's standing requirement, a plaintiff must allege personally injury failure traceable to the defendant's allegedly unlawful conduct likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737 (1984). There is no doubt that an attorney subjected to written rebuke has been injured, and that such an injury could be redressed by an appellate court's reversal of the lower court's rebuke. Yet it is on grounds of standing that Mr. English's appeal was dismissed.

There can be no minimizing the impact of a written rebuke. Practicing lawyers have long known the truth of the comments made by Justice Stevens "most lawyers are wise enough to know that their most precious asset is their professional reputation." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 413. *Id.* Because "[a] lawyer's reputation for integrity, thoroughness, and competence is his or her bread and butter," *FDIC v. Tefken Construction and Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988), "criticism delivered from the bench . . . can . . . damage a lawyer's reputation

and career." *Thomas v. Capital Security Servs. Inc.*, 836 F.2d 866, 878 (5th Cir. 1988). Because it harms a lawyer perpetually (rather than temporarily as with a fine), a public censure is perhaps the most damaging sanction that can be visited upon a lawyer. *See e.g.*, *Martin v. Brown*, 63 F.3d 1252, 1260 (3d Cir. 1995) ("[i]n the overall context of this case, the dollar amounts of the sanctions imposed . . . are insignificant in comparison to their stigmatic effect.").

A Judge's censure of an Assistant U.S. Attorney – especially accusations of false representations to the Court – can trigger a state bar or internal Department of Justice investigation, as they did in this case. *See* NMSA 1978, Rule 16-804(C) (professional misconduct for a lawyer to "engage in conduct" involving "misrepresentation."); United States Attorney's Manual at 1-4.100, *Allegations of Misconduct by Department of Justice Employees* (judicial findings of misconduct reported to Office of Professional Responsibility). Those investigations, in turn, can lead to discipline up to and including disbarment and termination of employment. NMSA 1978, Rule 17-206(A) (Rules Governing Discipline) ("A violation of the Rules of Professional Conduct or of these rules shall be grounds for . . . disbarment by the Supreme Court . . ."). It goes without saying that a federal judge has enormous power to impact the career and future of the attorneys who practice before him or her.[9]

9. District Courts continue to recognize in themselves a very broad, "inherent power" to sanction attorneys. *See, e.g., United States v. Seltzer*, 227 F.3d 36 (2d Cir. 2000) (discussing district court's power to discipline attorneys as part of its "inherent powers"); *see also In re Snyder*, 472 U.S. 634, 643 (1985) ("Courts have long recognized an inherent authority to suspend or disbar lawyers."). (Cont'd)

Sanctions sufficient to destroy an attorney's career must be sufficient to confer an attorney standing to appeal, particularly given the lengths the Court has stretched to confer standing. *See, e.g., United States v. Students Challenging Regulatory Authority Procedures*, 412 U.S. 669 (1973) (upholding standing to sue for loose association of law student who claimed that they were injured by the ICC's failure to prepare an environmental impact statement before deciding not to suspend a surcharge on railroad freight taxes; complaint alleged a very tangential injury by the surcharge to the law students' use of natural resources, such as forests, in the Washington D.C. area); *Duke Power Co. v. Caroline Environmental Study Group*, 438 U.S. 59 (1978) (Court affirms standing for an environmental group and others who sued the Nuclear Regulatory Commission, seeking a

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(Cont'd)

Without the "check and balance" of an appeal, attorneys find themselves at the mercy of the unrestrained power of a single district judge to harm or end their careers. This is fundamentally inconsistent with the idea of procedural fairness and limited powers. As one commentator has stated,

> I submit the following Madisonian postscript: We should always look askance upon any assertion of an inherent power by any branch of the federal government. The danger is more obvious when inherent powers are asserted by the political branches, but it is also implicated here, since Article III judicial power is, likewise, an enumerated power. Under the Constitution, federal tribunals are the limited courts of the same limited sovereign.

Thomas E. Baker, "The Inherent Power to Impose Sanctions: How a Federal Judge is Like an 800-Pound Gorilla," *The Review of Litigation*, No. 1 (1994).

declaratory judgment that the Price-Anderson Act, which limits liability for nuclear accidents, was an unconstitutional deprivation of property for *potential* accident victims).

For such an attorney's reputation to be summarily taken from an attorney without hope of review offends the notions of due process underlying our judicial system. The issue before the court is of extraordinary importance to every practicing lawyer. While the district court here was correct that "the task of ensuring that attorneys conduct themselves pursuant to recognized ethical precepts falls primarily upon district courts," *Order*, June 3, 2001, *citing United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981), fairness demands that attorneys have some right of redress when the court summarily, and in this case erroneously, finds that an attorney has violated ethical precepts.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED APRIL 29, 2003

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 01-2186

UNITED STATES OF AMERICA,

Plaintiff,

v.

CESAR GONZALES, aka Cougar; HECTOR GABRIEL LOPEZ, aka Shaggy; URIEL MARTINEZ, aka Duke; CESAR JUAREZ, aka Pelon; GUSTAVO AZCUENAGA, aka Mono; LUIS DELCID, aka Stranger; ERNEST GUEVARA, aka Yogi; RUSSELL BARBOA, aka Chino; JOHN ACOSTA, aka Lefty; BYRON ZAMORA, aka Trigger; OSCAR VILLA, aka Wino; RICHARD ACOSTA, aka Shorty; ROGER PRECIADO, aka Cartoon; JAIME VILLA, aka Psycho; MARCOS MAZZINI, aka Lucky; VINCENT NAJAR, aka Stalker; JASON DELATORRE, aka J. Bone; CHARLES TAYLOR, aka Yogie; URIEL BUSTAMONTE, aka Caps; MICHAEL MORA, aka M & M; DAVID GALLARDO, aka Cyclone; NEAL POLUS, aka Troy Thompson, aka Evil; FRANK LARA, aka Spooky,

Defendants.

THOMAS ENGLISH,

Movant-Appellant.

Appendix A

NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS,

Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. No. 95-CR-538-MV)

Before **SEYMOUR, BALDOCK** and **BRISCOE,** Circuit Judges.

BRISCOE, Circuit Judge.

Thomas L. English, a former Assistant United States Attorney, seeks review of a district court post-judgment order allegedly censuring him for misconduct in connection with his handling of a material witness in *United States v. Gonzales*, 95-CR-538 (D.N.M.). We dismiss the appeal for lack of standing.

I.

Gonzales was a complex, highly intense criminal prosecution in which the government charged twenty-three members of an Albuquerque street gang with various gang-related crimes including murder, attempted murder, drug trafficking, racketeering, and conspiracy. English was the lead prosecutor. During the discovery stage, the district court issued an order suppressing the testimony of a material witness as a sanction for prosecutorial violations. Specifically, the district court found that the government

had improperly coerced the testimony of the witness by issuing an arrest warrant that could be avoided if she cooperated, and that English had misrepresented to the court the extent of the government's contact with and control over the witness in order to avoid producing her to defense counsel.

The government filed an interlocutory appeal from the district court's suppression order, and we affirmed in part, reversed in part, and remanded. *United States v. Gonzales*, 164 F.3d 1285, 1293 (10th Cir. 1999). We rejected the district court's determination that the government had improperly coerced the material witness, *id.* at 1289-91, but affirmed the district court's conclusion that the government had misrepresented the extent of its contact with and control over the witness and interfered with defense access to her. *Id.* at 1292. Further, we concluded that the sanction of suppressing the witness' testimony was too severe and remanded to the district court for consideration of lesser sanctions, such as "allowing the witness to be redeposed by defense at government expense, censuring or fining the government attorneys involved in the misconduct, or recommending disciplinary proceedings against the government attorneys involved." *Id.* at 1293.

Following remand, the Disciplinary Board of the Supreme Court of New Mexico commenced inquiry into a complaint filed against English by defense counsel. The Disciplinary Board, after conducting an investigation of English based on his purported violation of the Rules of Professional Conduct in connection with *Gonzales*, issued an opinion finding there was insufficient evidence to support probable cause that he had engaged in misconduct.

Appendix A

Approximately nine months after the Board completed its investigation, the district court conducted an *in camera* hearing to determine whether personal sanctions should be imposed against English. By this time, the defendants in *Gonzales* had pled guilty and had been sentenced. At the *in camera* hearing, English apologized for any actions on his part that might have led the court to believe he was not respecting its authority. English also submitted a copy of the Disciplinary Board's report to the court. A representative for the defendants stated that the question of sanctions was for the court to decide and the defendants would make no recommendation regarding the matter. The district court stated that the case had been difficult for all parties involved, and that English and the other government attorneys had not made it easier with their tactics. The court also noted that defense counsel had caused their share of problems with repeated allegations of prosecutorial misconduct, many of which were unfounded. The court stated its belief that everyone had learned from the experience and concluded there would "be no further sanctions imposed in this matter." Aplt. App., Exh. 10 at 619.

Approximately three months later, the district court issued an order memorializing the *in camera* hearing. The order began by restating the relevant facts, and then stated:

> As the Court stated from the bench, this was a very difficult and trying case for everyone involved. However, the fact that this case was very tense and emotional does not absolve those who are entrusted with the power and authority of the

> State of their responsibilities as Officers of the Court. Armed with the power to deprive people of their liberty, the Government has a duty to ensure justice. The Government is not simply an adversary. The Government's focus should not be to win at all costs, but to advance integrity and fairness in our legal system.
>
> While this Court does not approve of the conduct of the Government in this case, this Court does not wish to prolong this matter any further. Counsel for the defendants did not take a position on the sanctions this Court is to impose. The Assistant United States Attorney has been before the State Disciplinary Board for his conduct in this case, and has suffered the consequences of his conduct in his community of fellow prosecutors as well as in the defense community. The Court trusts that the Government has learned from this experience, and in future cases will use its power not simply to gain the best advantage, but to make decisions that advance the fairness and integrity expected of those of us entrusted with the awesome power to decide people's lives. Therefore, the Court declines to impose sanctions.

Aplt. App., Exh. 1 at 448-49. English, on his own behalf, filed a motion asking the district court to reconsider its order. English argued that the district court's order constituted a criminal contempt sanction because it operated as a public censure. He also complained that he did not receive notice that the *in camera* hearing would operate as a criminal

contempt proceeding, and therefore he had not been allowed to present his side of the matter to the district court. He further argued that the only evidence before the court were the materials he submitted and those materials mandated a finding in his favor on the issue of misconduct. The district court denied English's motion in a written order issued June 3, 2001. The court concluded its April 18, 2001, order did not sanction English. Instead, it concluded that order "simply reiterate[d] the background of the case, stat[ed] previous findings that were made about the Government's conduct . . . and restate[d] in written form what the Court stated from the bench (to which the Government did not object at the time it was said)." Aplt. App., Exh. 3 at 510. English seeks appellate review of the district court's orders issued April 18 and June 3, 2001.

II.

The threshold, and ultimately determinative, issue is whether the district court's orders rise to the level of a sanction.[1] Because we conclude they do not, we in turn conclude that English has nothing from which to appeal. In other words, we conclude that English was not injured in the legal sense by those orders and therefore lacks standing to appeal.

The Circuits are divided over whether a court's written decision finding attorney misconduct, but not specifically imposing any type of sanctions (monetary or otherwise),

1. There is no doubt that the order from which English seeks to appeal is "final" for purposes of 28 U.S.C. § 1291, and that English's appeal is post-judgment.

is appealable. On one end of the spectrum is the Seventh Circuit, which has held that an attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential effects of the finding on the attorney's professional reputation. *See Clark Equip. Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992). On the other end of the spectrum is the Fifth Circuit, which has held that a written order finding an attorney engaged in professional misconduct, but not imposing monetary liability or other sanctions, constitutes an appealable injury. *See Walker v. City of Mesquite*, 129 F.3d 831, 832-33 (5th Cir. 1997) (stating "the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for . . . appeal"). Other circuits lie somewhere between. *See Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1199 (9th Cir.1999) (concluding that a formal finding of a violation of a specific rule of ethical conduct is akin to an explicit pronouncement of a reprimand and is thus appealable); *In re Williams*, 156 F.3d 86, 92 (1st Cir.1998) (concluding that only judicial comments expressly identified as reprimands or sanctions are appealable); *Sullivan v. Comm. on Admissions & Grievances*, 395 F.2d 954, 956 (D.C. Cir. 1967) (holding a district court's written finding that attorney violated several judicial canons, but declining to impose sanctions, was appealable). Although we have held that "[c]ounsel have standing to appeal orders that directly aggrieve them," *Weeks v. Indep. Sch. Dist. No. I-89, Oklahoma County, Okla.*, 230 F.3d 1201, 1207 (10th Cir. 2000), we have not decided whether an attorney is "directly aggrieved" by an order simply finding misconduct on his or her part.

We find it unnecessary to decide the issue here given the facts of this case. Even if we were to adopt the Fifth Circuit's position in *Walker*, i.e., that a written finding of professional misconduct is sufficient to provide an attorney standing to appeal, it is apparent there was no such finding in the orders that English now seeks to challenge. In its April 18, 2001, order, the district court reviewed its earlier findings and stated that the government's focus should not be to win at all costs but to advance integrity and fairness in the legal system. The court stated that it did not approve of the government's conduct and hoped it had learned from the experience, and in the future would use its power not to gain the best advantage, but to make decisions which would advance fairness and integrity. Importantly, and contrary to English's assertions, the district court made no new "factual findings" in its order, and instead restated its earlier findings (made in 1997). Although English argues the court's restatement of its earlier findings constitutes a "reimposition" of sanctions, he cites no authority for this proposition other than an obscure reference to defamation law which has no bearing on this case. Likewise, there were no "new" findings of misconduct in the court's June 3, 2001, order rejecting English's motion for reconsideration.

As a final matter, we reject the dissent's suggestion that English was "previously unable to fully contest this matter" or was otherwise denied due process. Dissent at 16. When the district court issued its original suppression order, the government filed a timely interlocutory appeal challenging that order. Although the district court's order included findings of misconduct on the part of English, English did not timely seek to intervene in the government's

interlocutory appeal in order to challenge those findings, but instead waited to file a motion to intervene after this court's decision was issued. *See generally Penthouse Int'l Ltd. v. Playboy Enterprises, Inc.*, 663 F.2d 371, 385-86, 392 (2d Cir. 1981) (allowing an attorney to intervene on appeal to contest the district court's finding of misconduct which was part of its reasoning in dismissing a complaint for discovery abuses). On remand, English made no effort to seek an evidentiary hearing, but instead proffered the record of the state disciplinary proceeding in an attempt to rebut the district court's findings that he had engaged in misconduct. Further, English made no attempt to appeal the findings of misconduct (i.e., those contained in the district court's suppression order) after final judgment was entered by the district court. *See generally Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 209-10 (1999) (concluding that sanction orders are typically appealable only after final judgment is entered).

The appeal is DISMISSED.

Appendix A

BALDOCK, Circuit Judge, dissenting.

Former Assistant United States Attorney Thomas English seeks review of district court post-judgment orders allegedly censuring him for misconduct in connection with his handling of a material witness in *United States v. Gonzales*, 95-CR-538 (D.N.M., filed Oct. 18, 1995). In a decision dismissing the appeal, the Court holds Attorney English "was not injured in the legal sense by those orders and therefore lacks standing to appeal." Court's Op. at 6-7. Because I believe the language of the district court's orders constituted a sanction sufficiently injurious to give Attorney English standing to appeal, I dissent.

I.

The factual background necessary to begin understanding this appeal is set forth in *United States v. Gonzales*, 164 F.3d 1285 (10th Cir. 1999). *Gonzales* was a complex, highly intense criminal prosecution in which the Government charged twenty-three members of an Albuquerque street gang with various gang-related crimes including murder, attempted murder, drug trafficking, racketeering, and conspiracy. Attorney English was the Government's lead prosecutor. During the discovery stage, defense counsel moved to dismiss certain counts of the indictment due to "unconscionable" and "outrageous" government conduct surrounding a material witness. Without prior hearing, the district court entered a twenty-two page order limiting at trial the material witness' testimony as a sanction for purportedly ongoing prosecutorial misconduct. The order criticized both the Government and Attorney English. Upon the Government's motion to

reconsider, the court entered a 119-page order suppressing the witness' statements and barring her testimony.

On interlocutory appeal pursuant to 18 U.S.C. § 3731, this Court upheld the district court's decision to sanction the Government, repeatedly specifying English by name, for what, in the Court's opinion, were "obvious" violations of district court discovery orders directing the Government to provide " 'face-to-face' " access to its confidential witnesses.[2]

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2. As we acknowledged in *Gonzales*, 164 F.3d at 1291, the Federal Rules of Criminal Procedure do not require such "face-to-face" encounters. *See* Fed.R.Crim.P. 16. Indeed, criminal defendants are entitled to rather limited discovery under federal law. *See Degen v. United States*, 517 U.S. 820, 825 (1996). The record in this case, however, reveals the district court, in its "supervisory power," entered discovery orders exceeding the requirements of the federal discovery rules which the Government never challenged on appeal. The district court admitted "the Government's discovery obligations here are not based on Rule 16." In addition to requiring the aforesaid encounters, the district court, for instance, required the Government to provide defense counsel addresses and in-person access to witnesses who had been placed in the Witness Security Program to protect them from Defendants. The court further required the Government to provide defense counsel, within two days of an interview, any information that an agent had obtained from a person about the case regardless of whether the Government intended to use that person as a witness or had prepared a report. *But see id.* (criminal defendants have no general right to obtain statements of Government witnesses before they testify). Such a requirement may very well contravene the mandatory language of the Jencks Act, 18 U.S.C. § 3500. While a criminal court possesses *some* inherent discovery power, *see, e.g.*, *United States v. Golyansky*, 291 F.3d 1245, 1248-49 (10th Cir. 2002) (upholding discovery order requiring

(Cont'd)

The opinion described the Government's conduct as the "product of flagrant bad faith" and noted Defendants' "ability to prepare for trial was prejudiced by the government's obstruction of access to the subject witness." *Gonzales*, 164 F.3d at 1292. But the Court did not share the district court's view that prejudice to Defendants was irreparable. The Court therefore reversed the district court's choice of the "most severe available sanction, i.e., complete suppression of the witness' statements and trial testimony," and remanded

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(Cont'd)

disclosure of *Brady* material as it became available), such power is not unlimited. The Supreme Court has explained "it is well established that even a sensible and efficient use of the supervisory power is invalid if it conflicts with . . . statutory provisions. To allow otherwise would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (internal brackets, ellipses, quotations, and citations omitted); *see also United States v. Widgery*, 778 F.2d 325, 329 (7th Cir. 1985) (Easterbrook, J.) ("The supervisory power is part of the common law, and no court has a common law power to disregard a rule or statute that was within the authority of Congress to enact."); *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991) (Kozinski, J.) ("The supervisory power simply does not give the courts the authority to make up the rules as they go, imposing limits on the executive according to whim or will."). This Circuit has not addressed to what extent a district court possesses "supervisory power" in criminal matters to order discovery beyond the limits of Rule 16 or other federal law. *Cf. United States v. United States District Court*, 717 F.2d 478, 480-82 (9th Cir. 1983) (Kennedy, J.,) (holding the Freedom of Information Act did not extend the scope of discovery under Fed.R.Crim.P. 16 and issuing a writ of mandamus directing the district court to limit discovery consistent with Rule 16).

"for consideration of less severe sanctions" including possible censure or referral to disciplinary authorities. *Id.* at 1292-93.

The Government moved unsuccessfully for panel rehearing, arguing the Court relied on inaccurate facts in citing Attorney English for misconduct. English also filed an unsuccessful pro se motion for leave to intervene before this Court. In his motion, English argued (1) he had not been a party before the district court; (2) he had no notice this Court would censure him so harshly; (3) he was not represented by counsel; and (4) he had been unable to defend his interest in his professional reputation because the Government feared he would become a witness and thus unable to continue as lead prosecutor in the case.

Following remand, the Disciplinary Board of the Supreme Court of New Mexico commenced inquiry into the matter on the complaint of defense counsel. Over the course of nearly a year, the Board conducted, consistent with due process, a complete investigation of Attorney English based on his purported violation of numerous Rules of Professional Conduct in connection with *Gonzales*. *See*, *e.g.*, N.M. Rules Ann. 16-303 (Candor toward the tribunal); 16-304 (Fairness to opposing party and counsel); 16-404 (Dealing with unrepresented persons); 16-804 (Misconduct). The Board concluded the evidence was insufficient to support a finding of probable cause that Attorney English had engaged in misconduct before the district court. In a report favorable to Attorney English, a copy of which is attached hereto as an Appendix, the Chief Disciplinary Counsel for the Board found, among other things, that English did not make knowing misrepresentations

to the district court and did not interfere with defense counsel's access to the subject witness.[3] The report further found: "Mr. English did as much as was humanly possible to comply with the court's discovery orders and facilitate the exchange of information." Disciplinary Counsel wrote:

> I am not attempting to "overrule" the courts; it is merely that what a judge may find exasperating is not necessarily evidence that one has intentionally failed to expedite litigation, obstructed a party's access to evidence or disobeyed an obligation under procedural rules in violation of the Rules of Professional Conduct.[4]

Nine months after the Board issued its report exonerating Attorney English, the district court, on January 26, 2001, held an *in camera* hearing on remand to determine "whether or not personal sanctions should be imposed on Mr. Thomas L. English, Assistant United States Attorney." At the time of the hearing, all Defendants in the *Gonzales* case had pled guilty and had been sentenced. During the hearing, English submitted the Disciplinary Board's report to the court without

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3. Although the report originally was confidential, Attorney English has made it a part of the public record in this case.

4. After the Board issued its report, Attorney English, now represented by counsel, unsuccessfully filed a "Petition for Relief Under the All Writs Act, and for a Writ of Error Coram Nobis or Other Extraordinary Writ, or in the Alternative, a Motion to Recall the Mandate Seeking Review of this Court's Opinion in *United States v. Gonzales*, 164 F.3d 1285 (10th Cir. 1999)."

objection from defense counsel. The district court, after thanking English, informed him "[t]here will be no further sanctions imposed in this matter."

At the hearing, the Government and defense counsel submitted a two page stipulated order to the district court (a point overlooked by this Court) which asked the court to find that "no fine, censure of any kind, or other sanction is appropriate against any of the government attorneys involved in this matter." The court did not enter the order. Instead, three months later, the district court, without further hearing and without warning, issued a written order on the matter which this Court in my opinion inaccurately characterizes as "memorializing the *in camera* hearing." Court's Op. at 5.

The district court noted the Disciplinary Board had found insufficient evidence to establish a violation of ethical rules, and reiterated that "no sanction shall issue" against Attorney English. But the court did not stop there. Quoting its original order suppressing the subject witness' statement and barring her testimony, the court referred to the "Government's 'course of conduct in pursuing this most serious of prosecutions that has forced the Court to issue countless admonitions and lesser sanctions in response to the Government's misconduct, . . . as well as misrepresentations made in open court . . . by lead Government counsel that interfered with Defendants' court-ordered access to [the subject witness].' " The district court noted this Court's approval of its findings on appeal and stated:

> While this Court does not approve of the conduct of the Government in this case, this Court does

> not wish to prolong this matter any further. . . . The Assistant United States Attorney has been before the State Disciplinary Board for his conduct in this case, and has suffered the consequences of his conduct in his community of fellow prosecutors as well as in the defense community. The Court trusts that the Government has learned from this experience, and in future cases will use its power not simply to gain the best advantage, but to make decisions that advance fairness and integrity expected of those of us entrusted with the awesome power to decide people's lives. Therefore, the Court declines to impose sanctions.

Attorney English filed a motion to reconsider the foregoing order which the district court construed as a motion to alter or amend under Fed.R.Civ.P. 59(e). English characterized the court order as both a "public censure" and a "harsh, punitive, sanction" against him. In denying the motion, the court responded:

> The Court has found that the Government committed misconduct in the course of the *Gonzales* case. The Tenth Circuit upheld that finding. The Government apparently wishes for this Court to reverse its previous findings, as well as those of the Tenth Circuit, in order to exonerate him. The Court decided not to impose sanctions, but it will not, and did not decide to, reverse its previous findings.

Appendix A

II.

The Court is correct in initially addressing its jurisdiction over Attorney English's appeal.[5] I agree with the Court that the jurisdictional question is whether the district court's orders in fact constitute "sanction orders," for if they do not, then English has nothing from which to appeal. In other words, if English was not "sanctioned," he was not injured in the legal sense and has no standing to appeal.[6]

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5. A sanction order against counsel generally is appealable only after entry of final judgment, and then only as a "final decision" under 28 U.S.C. § 1291. *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1025, 1029 (10th Cir. 1998); *G.J.B. & Assoc., Inc. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990). English's appeal is post-judgment and the "decision" he appeals from is "final."

6. *Compare Bolte v. Home Ins. Co.*, 744 F.2d 572 (7th Cir. 1984). In *Bolte*, the district court found two insurance defense attorneys had concealed a defense witness' identity and statements. The court described their conduct as "reprehensible," but imposed no formal sanction upon them. The Seventh Circuit dismissed the attorneys direct appeal for lack of a "final decision." Judge Posner broadly reasoned, perhaps correctly in the abstract, that "Congress, in making 'final decisions' of district courts appealable in 28 U.S.C. § 1291, [did not] mean[ ] to allow people who were not even parties to a lawsuit in the district court to appeal from a wounding or critical or even palpably injurious comment or finding by a district judge." *Id.* at 573. *Bolte*'s reasoning, which may reflect "distaste for the [attorneys'] position or lack of concern with injury of the nature alleged" has been labeled "dubious." 15A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3902.1, at 130-31 & n.52 (1992). Given *Bolte*'s holding, the court did not definitively resolve whether "the stigma of being accused by

(Cont'd)

Appendix A

A.

As the Court notes, the circuits are divided over whether a court's written decision finding attorney misconduct alone, though not formally labeled a sanction, is appealable. In a case similar to this, the D.C. Circuit held a written order finding an attorney violated ethical rules, but not formally imposing sanctions, constituted an appealable injury. *Sullivan v. Committee on Admissions and Grievances*, 395 F.2d 954 (D.C. Cir. 1967) (Burger, J.). As in this instance, "the District Court concluded for appropriate reasons not to impose sanctions in this case. However, the District Court . . . determined that [the attorney] was guilty of proscribed conduct and this determination plainly reflect[ed] adversely on his professional reputation. . . ." The D.C. Circuit concluded this reputational damage gave the attorney standing to appeal. *Id.* at 956.

(Cont'd)

a federal judge of 'reprehensible' conduct is [in itself] injury enough to satisfy the standing requirement in Article III of the Constitution." *Bolte*, 744 F.2d at 573. The court suggested it might "by analogy to the injury on which the tort of defamation is based." *Id.* Similarly, the Seventh Circuit decision which the Court cites, *Clark Equip. Co. v. Lift Parts Mfg. Co. Inc.*, 972 F.2d 817, 820 (7th Cir. 1992), did not turn on standing but rather relied exclusively on *Bolte* (*i.e.*, the lack of a final decision) to hold "an attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects." The Federal Circuit recently questioned both *Bolte* and *Clark Equipment*. *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1350-53 (Fed. Cir. 2003) (holding a court's formal reprimand of an attorney for misconduct appealable).

The Fifth Circuit reached a like conclusion in another similar case. In *Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997), the district court found an attorney engaged in "blatant misconduct" by violating his obligation of candor to the court. Like here, the court levied no other sanction against the attorney. Rejecting the argument that an attorney's diminished reputation was not a cognizable injury for purposes of appeal, the Fifth Circuit wrote:

> In the case at bar [the attorney] was reprimanded sternly and found guilty of blatant misconduct. The reprimand must be seen as a blot on [the attorney's] professional record with a potential to limit his advancement in governmental service and impair his entering into otherwise inviting private practice. We therefore . . . hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for appeal of a court order finding professional misconduct.

Id. at 832-33.

Taking a different approach, a divided panel of the First Circuit disagreed with the Fifth Circuit in *In re Williams*, 156 F.3d 86 (1st Cir. 1998). The district court affirmed the factual finding of the bankruptcy court that two government tax attorneys failed to comply with discovery requests. The bankruptcy court "harshly criticized" the attorneys, "characterizing their conduct as obstructionist and

unjustified." *Id.* at 88. The First Circuit dismissed the attorneys' appeal, holding "[w]ords alone" constitute an appealable sanction only "if they are expressly identified as a reprimand." *Id.* at 92.

"Mindful that every pejorative expression or criticism by a court of a lawyer is not subject to appeal," the dissent viewed the bankruptcy court's words as "not a mere finding of fact, but an ultimate statement of censure, intended to punish counsel." *Id.* at 96 (Rosenn, J., dissenting). The dissent protested: "Denying [attorneys] the right to an appeal in a matter impugning their character, competence or integrity . . . and which publicly and harshly censures them merely because the chastisement is not expressly a 'formal reprimand' exalts form over substance." *Id.* at 99.

Three of seven active judges on the First Circuit dissented from denial of the attorneys' request for rehearing en banc. That dissent aptly noted among other things that "[b]eing branded unethical or incompetent by a federal judge can essentially destroy a lawyer's career." *Williams v. United States*, 158 F.3d 50, 50 (1st Cir. 1998) (Lynch, J., dissenting from denial of reh'g en banc). Like the panel dissent, the dissent from denial of rehearing en banc also criticized the opinion's formalism: "This sort of formalism, which has been abandoned in so many areas of the law . . . seems especially inappropriate in an area which the premise of any appeal is likely to be the assertion that the order was issued by an intemperate decisionmaker." *Id.* at 51.

Two decisions from the Ninth Circuit are also noteworthy. *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194

(9th Cir. 1999) relied on *Williams* to conclude that a district court's disparaging comments about counsel did not alone constitute an appealable sanction against him. The attorney intervened on behalf of a client to object to a class action settlement. The court entered an order finding the attorney's intervention "reflects a serious lack of professionalism and good judgment." *Id.* at 1196. The court described his objections as "groundless, contrived and misplaced." *Id.* Rejecting the notion the court's words constituted a formal reprimand, the Ninth Circuit "decline[d] to find . . . that any time a court includes critical words about an attorney's conduct in an order, those words constitute a formal reprimand." *Id.* at 1199.

The Ninth Circuit subsequently narrowed *Weissman*'s reach in *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000). The district court found an attorney had violated the California Rule of Professional Conduct prohibiting ex parte communications with a represented party. The Ninth Circuit drew a line "between routine judicial commentary and commentary that is inordinately injurious to a lawyer's reputation," *id.* at 1137, and held the court's finding, although not formally labeled a sanction, constituted an appealable sanction order:

> *Weissman* and *Williams* . . . do not determine our jurisdiction in this case. Those cases addressed only instances in which mere judicial criticism constitutes an appealable sanction. The district court . . . , however, did more than use "words alone" or render "routine judicial commentary." Rather the district court made a finding and

> reached a legal conclusion that [the attorney] knowingly and wilfully violated a specific rule of ethical conduct. Such a finding, *per se*, constitutes a sanction. The district court's disposition bears a greater resemblance to a reprimand than to a commentary merely critical of inappropriate attorney behavior. . . . If the court's formal finding is permitted to stand, it is likely to stigmatize [the attorney] among her colleagues and . . . could have a serious detrimental effect on her career. . . . We have no reluctance in concluding that the district court's finding of an ethical violation by [the attorney] is an appealable sanction.

Id. at 1137-38.

B.

An attorney's professional reputation undoubtedly is his or her most valuable asset. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part) ("I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation."). Findings of serious ethical misconduct can cast dark shadows over an attorney's career. *See, e.g., McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52, 81 (D.C. Cir. 2001) (noting that an attorney's interest in an untarnished reputation is greater than the "mere loss of money."). Accordingly, I reject the proposition that before an order asserting counsel's ethical misconduct constitutes an appealable sanction, a court must

misconduct a formal reprimand or censure. "Stripped to essentials this proposition would maintain that an attorney has more of a reason and interest in appealing the imposition of a $100 fine than appealing a finding and declaration by a court that counsel is an unprofessional lawyer prone to engage in blatant misconduct." *Walker*, 129 F.3d at 832. "Monetary sanctions only affect one's bank account; linguistic sanctions can pierce the heart and reputation of the lawyer at whom they are aimed and, in the long run, probably will strike the lawyer's bank account as well." *Williams*, 156 F.3d at 97 (Rosenn, J., dissenting).

In no way do I mean to imply that every negative comment or observation from a judge's pen about an attorney's conduct or performance is appealable. *See, e.g.*, *Weissman*, 179 F.3d at 1199. It is not. But demanding the requisite formality the First Circuit imposed in *Williams* simply is unfair to the overwhelming majority of attorneys who conduct themselves in accordance with rules of professional responsibility and ably serve as officers of the court. Under *Williams*' rationale, a court presumably could find an attorney engaged in outrageous, even felonious misconduct, while insulating its findings, justifiable or otherwise, from appellate review by refraining from labeling them a sanction:

> [T]here are few checks on what judges say about counsel other than the judge's own prudence. A lawyer attempting to pursue a client's interest zealously may, if faced with an arbitrary judge or a judge who has an erroneous view of the facts,

> end up with a blot on his or her record that will never be erased-unless an appeal is possible to correct the problem.

Williams v. United States, 158 F.3d 50, 50 (1st Cir. 1998) (Lynch, J., dissenting from denial of reh'g en banc). Needless to say, "[a]rmed with life tenure and broad discretion, a [federal] judge can do great harm to a lawyer's career, while the attorney has virtually no recourse at all." Steve Lubet, *Just Who Made Federal Judges God?*, Chic. Trib., Aug. 10, 2001, at 23. I am satisfied that an attorney's ability to fight reputational damage arising from a court order should not be dependent on how the court labels that order.

Criticism that this approach is unworkable and "tantamount to declaring open season on trial judges" is misplaced. *See Williams*, 156 F.3d at 91. The D.C. Circuit, in a case where a disciplinary committee found ethical rules violations but did not formally impose sanctions, adopted the same approach over thirty years ago. *Sullivan*, 395 F.2d at 954. The problems the First Circuit foresaw in *Williams* have not materialized. I believe the *Williams* approach is more akin to declaring open season on trial attorneys. The possibility of appellate review is a proper check in those rare instances where a federal court is too willing to unilaterally issue an idle reprimand. Meanwhile, an attorney's self interest directs that he or she appeal only where the court's words are especially damaging to the attorney's reputation and perhaps unjustified. This is because an attorney appealing a reprimand "takes the risk that this court, reaching the merits, will agree that the sanction is justified—

thus giving the sanction far more force than it would have had if it had come from a trial judge unendorsed by a reviewing court." *Williams*, 158 F.3d at 51 (Lynch, J., dissenting from denial of reh'g en banc).

C.

Unlike the Court, I conclude the district court's unequivocal language in its written orders on remand constitutes a sanction sufficiently injurious to Attorney English's professional reputation to provide him standing to appeal. *See Weeks v. Independent Sch. Dist. No. I-89*, 230 F.3d 1201, 1207 (10th Cir. 2000) ("Counsel have standing to appeal orders that directly aggrieve them.").[7] The Court's conclusion that the district court's two post-judgment orders made no "new 'factual findings' of misconduct," Court's Op. at 8, seems patently unfair given that Attorney English was previously unable to fully contest this matter. *See supra* at 4. Moreover, the Court's decision disregards our duty to review questions of ethical misconduct within the parameters of due process. To be sure, the court's orders state no sanction shall issue. *See Sullivan*, 395 F.2d at 956. A careful reading of the orders, however, convinces me that their substance trumps

7. The district court in *Weeks* disqualified plaintiff's counsel from participating in the litigation due to improper ex parte communications. We held counsel had standing to appeal the disqualification order based on injury to her professional reputation. "The disqualification order is a sanction directly affecting [counsel], and a favorable court decision would likely provide at least some redress from the injury from the sanction because it could help ameliorate the damage to her professional reputation from the sanction order." *Weeks*, 230 F.3d at 1207.

their form. *See Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984) ("[A]lthough sanctions in the usual sense were not imposed, the judge's refusal to vacate his earlier finding of misconduct imposed or confirmed a sanction of sorts, in a realistic though not formal sense, on the lawyers.").

Without explanation, the district court's orders all but ignore the New Mexico Supreme Court Disciplinary Board's findings-findings made after full and fair investigation. The district court's written orders plainly reprimand Attorney English a second time for blatant ethical misconduct and an abuse of power. While not referring specifically to English by name or citing the applicable rules of professional conduct, the court refers to "misrepresentations made in open court . . . by lead Government counsel that interfered with Defendants' court-ordered access to [the subject witness]." By all accounts, the district court engaged in more than "routine judicial commentary." *Talao*, 222 F.3d at 1137. No citation to authority is necessary to conclude that such misrepresentation violates long established rules of professional conduct. Insistence upon candor to the court is perhaps the most important ethical precept of all.[8]

The district court further notes Attorney English used his power "simply to gain the best advantage," and consequently suffered for his misconduct: "The Assistant United States Attorney has been before the State Disciplinary Board for his conduct in this case, and has suffered the consequences of his conduct in his community of fellow

8. Notably, neither *Williams* nor *Weissman* involved findings of intentional misrepresentation to the court.

prosecutors as well as in the defense community."[9] The district court's orders served not only to emphasize the court's prior findings of ethical misconduct and to illustrate the court's disagreement with the Disciplinary Board's contrary findings, but also to strike another blow to Attorney English's professional reputation. And yet this Court concludes Attorney English was not sufficiently injured to provide him standing to appeal. The language of the district court's orders did much more than "memorializ[e][ ] the *in camera* hearing." Court's Op. at 5. The orders adjudge Attorney English unethical. For these reasons, I believe Attorney English has standing to maintain this appeal, and now proceed to the merits.

III.

Matters of attorney discipline by their very nature often come to us outside the common adversarial context. I am mindful that no one has recorded opposition to Attorney English's request for relief in this case, and thus I proceed cautiously. The proper starting point is to consider the source of the district court's power to sanction Attorney English for

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9. Attorneys under the jurisdiction of the Department of Justice (DOJ) must report to their supervisors any "statement by a judge or magistrate indicating a belief that misconduct by a Department employee has occurred." *United States Attorneys' Manual*, § 1-4.120(A). Whenever a judge or magistrate makes a finding that a DOJ attorney has engaged in misconduct, the attorney must immediately report the finding to the DOJ Office of Professional Responsibility "regardless whether the matter is regarded as serious or non-serious." *Id.* § 1-4.120(B). Needless to say, a court may do much damage to an attorney's career within DOJ.

of the district court's power to sanction Attorney English for noncompliance with pretrial discovery orders extending beyond the requirements of criminal rules and statutes. *See Gonzales*, 164 F.3d at 1291 (noting "Fed. R. Crim. P. 16 is inapplicable here because it does not require the government to make its witnesses available for defense interviews.").

A.

Assuming the district court legitimately imposed such orders (a question not before the Court, *see supra* n.1), the court's ability to enforce those orders rests in its "inherent power." Whether exercised in a civil or criminal context, "[t]he inherent powers of federal courts are those which are necessary to the exercise of all others." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Id.*

> The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from others, undertakes to define its own authority. In many instances the inherent powers of the courts may be controlled or overridden by statute or rule. Principles of deference counsel restraint in resorting to inherent power, and require its use to be a reasonable response to the problems and needs that provoke it.

Degen v. United States, 517 U.S. 820, 823-24 (1996). "The conceded power of federal district courts to supervise the conduct of attorneys should not be used as a means to substantially alter federal criminal law practice." *Grievance Committee v. Simels*, 48 F.3d 640, 644 (2d Cir. 1995). A court must remain mindful that its inherent power "is limited by the necessity giving rise to its exercise." *Degen*, 517 U.S. at 829. "In short, the inherent power springs from the well of necessity, and sparingly so." *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1407 (5th Cir. 1993).

In this case, the district court entered its post judgment orders (1) after the district court had already reprimanded English for his conduct, (2) after Defendants had pled guilty and been sentenced, (3) after the New Mexico Supreme Court's Disciplinary Board had exonerated English, and (4) after the court announced at hearing that no further sanctions would issue. The district court's written orders serve no meaningful purpose other than to pour new salt into old wounds. In short, the district court's post-judgment orders sternly denouncing Attorney English's conduct were unnecessary at that stage of the proceedings and thus beyond the court's inherent power to issue.

B.

I am well aware that this Court also disapproved of Attorney English's apparent misconduct at the discovery stage. *Gonzales*, 164 F.3d at 1291-92. At that time, we suggested, among other things, "recommending disciplinary proceedings against the government attorneys involved." *Id.* at 1293. That is precisely what occurred, albeit on the

complaint of defense counsel. Thereafter, for the first and only time in this case, an independent, impartial Disciplinary Board investigated the alleged misconduct with all the procedural safeguards necessary to ensure a fair decision. This Court should not lightly disregard the Disciplinary Board's findings and conclusions made after thorough inquiry where our prior decision was based on a limited record.[10] While not conclusively binding on a federal court, a state supreme court's determination in a disciplinary matter "brings title deeds of high respect." *Theard v. United States*, 354 U.S. 278, 282 (1957). Andrew L. Kaufmann, *Judicial Ethics: The Less-Often Asked Questions*, 64 Wash. L.Rev. 851, 864 (1989), provides the proper perspective:

> Public criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a

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10. Whether the law of the case doctrine applies to questions of fact is uncertain. *Johnson v. Champion*, 288 F.3d 1215, 1226 (10th Cir. 2002). Even if the doctrine does apply to such questions, however, I do not believe it binds the Court in this case given the intervening change in circumstances, namely the Disciplinary Board's findings and conclusions. Law of the case principles are not absolute. *See Kennedy v. Lubar*, 273 F.3d 1293, 1299 (10th Cir. 2001). The doctrine is "to be applied at the sound discretion of the court to effectuate the proper administration of justice." *United States v. Gama-Bastidas*, 222 F.3d 779, 785 (10th Cir. 2000) (internal quotations omitted). Reasons for departing from the law of the case include (1) an intervening change in controlling law, (2) the availability of new evidence, (3) the need to correct clear error, and (4) the need to prevent manifest injustice. *See Kennedy*, 273 F.3d at 1299 n.6. Given the Board's findings, the latter three reasons seem particularly relevant here.

> disciplinary proceeding may destroy or severely damage a lawyer's reputation. When the lawyer has no chance to defend, the mere mention of the fact of reference to disciplinary authorities is problematic, especially if accompanied by an unfavorable characterization of the lawyer's conduct.

A court "that has the power but is unwilling to undertake the disciplinary process itself, either directly or through a master (or other body appointed by it), should be very cautious about specific comments it makes about discipline." *Id.* at 866-67.

Indeed, a federal court unprepared to provide procedural safeguards to an attorney in a case such as this should defer to the findings and conclusions of a state disciplinary board where no good reason appears why those findings and conclusions should not be accepted or given effect. *See Selling v. Radford*, 243 U.S. 46, 50 (1917); *In re Gordon*, 640 F.2d 1143, 1150 (10th Cir. 1981); *see also Theard*, 354 U.S. at 282 (stating that *Selling* "authoritatively expounded" the recognition a federal court must accord a state judgment of disbarment). Federal courts should defer to state court disciplinary findings and conclusions unless an independent review of the state record reveals (1) a state procedure that lacks due process because of failure to provide adequate notice and opportunity to be heard, (2) an "infirmity of proof," or (3) some other "grave reason" why the federal court should not defer to the state proceedings. *Selling*, 243 U.S. at 51. *Selling* remains the law today. *See, e.g., In re Caranchini*, 160 F.3d 420, 424-25 (8th Cir. 1998). This Court's failure to require the district court to provide

any explanation for its refusal to defer to the findings of the State Disciplinary Board makes this case all the more troubling.

IV.

For the foregoing reasons, I would hold Attorney English has sustained sufficient reputational injury from the district court's post-judgment orders to establish his standing to appeal. As to the merits, I would at a minimum strike from the record the district court's orders herein dated April 18, 2001 and June 3, 2001 as beyond its inherent authority. I would direct that the district court's statement following the *in camera* hearing on January 26, 2001 that "[t]here will be no further sanctions imposed in this matter" serve as its final order in this matter.

Accordingly, I dissent.

Appendix A

THE DISCIPLINARY BOARD

AN AGENCY OF THE SUPREME COURT OF THE STATE OF NEW MEXICO

Phone: (505) 842-5781 • Facimile: (505) 766-6833

Mailing Address:
P.O. Box 1809
Albuquerque, NM 87103-1809

400 Gold SW • Suite 1100
Albuquerque, NM 87102

April 25, 2000

Re: Complaint against Thomas L. English, Esq. and Esq.
Docket Nos. 2000-2-2889 and 2000-2-2890

As you are aware, your complaint filed against Thomas L. English, Esq., and Esq., has been under investigation by this office since March 29, 1999. That investigation has now been concluded, and the entire file has been independently reviewed by one of the Board's hearing officers in your area.

The reviewing officer, after having studied numerous transcripts, depositions, court orders and opinions, and witness Interview notes, concurs with the opinion of this office that there is insufficient evidence to establish a probable cause belief that either of these attorneys has violated any of the Rules of Professional Conduct. Permit me to explain our decision.

Appendix A

(1) *Coercion of Angela Tello and "Unlawful" Warrant*

With respect to the allegation that Messrs. English and ___ obtained an "unlawful" warrant from Judge Blackmer and used is to coerce Angela Tello into becoming a prosecution witness, it is abundantly clear that Mr. English played no role whatsoever in obtaining the warrant. The warrant was obtained by Mr. Montario, Detective Lawis, and ATF Agent Ainsworth at the urging of Detective Lewis. Judge Blackmer was selected because (a) this was a state case (note caption on warrant) and (b) Judge Blackmer had continuing jurisdiction over Tello, who was serving a probationary sentence as a juvenile imposed by Blackmer. While Tello's testimony would eventually have been used in the federal Suredo cases, that fact would not preclude the State of New Mexico from having proceeded against her as well on state charges or have mandated that any contact with her be conducted through the federal court. The fact that the warrant was a state warrant would not render it "unlawful."

Everyone involved—including Judge Blackmer—is adamant that Mr. English neither was present during the issuance of nor consulted in advance about the warrant. Additionally, the available evidence also indicates that everyone present agrees that while inquired of the judge whether an actual arrest would be necessary if Angela Tello decided to give information to the detectives, it was the judge on his own initiative who added the "escape clause" to the warrant. In short, there is no evidence that either or Mr. English acted improperly in obtaining this warrant. This office has no jurisdiction over Judge Blackmer, but it is my understanding that you have also raised your concerns with the Judicial Standards Commission.

The reviewing officer and I tend to agree with the Tenth Circuit that there is no evidence the warrant was used coercively or that the arrest somehow traumatized Ms. Tello. The only input on the subject from Ms. Tello herself appears to be her deposition and certainly that would not support a theory that she was upset by either the warrant or the presence of the officers who served it. Furthermore, the fact that she subsequently absconded from the drug program in Seattle and returned to Albuquerque of her own accord would greatly dilute any argument that the "threat" of being returned to Albuquerque was somehow coercive.

(2) *English Misrepresentation to the Court Regarding Government's Control of Angela Tello*

While Mr. English may or may not have accurately portrayed the parameters of the government's relationship with Angela Tello when he advised the court on two separate occasions that she was not under the government's "control," it appears that he had a good faith belief that she was not in fact under his "control." Although Tello's exact status on September 4, 1996, and January 24, 1997 (when the statements were made) may be subject to argument, there is no evidence that Mr. English made knowing misrepresentations to the court in violation of Rule 16-303(A)(1) or Rule 16-804(C) (both of which appear to require a certain degree of scienter.)

Mr. English has explained in some detail that there were hundreds of witnesses involved in this case. Some of these witnesses were relocated by his office under the aegis of the Federal Witness Protection Program; these witnesses he

viewed, as under his "control," but Ms. Tello was not in this position. While she was a cooperating witness, she was "relocated" not by Mr. English but by Judge Blackmer. Furthermore, at the time of his first statement regarding his lack of control over Ms. Tello, she had absconded from the Seattle program and was under *no* one's control. He advised Mr. Donatelli of this immediately after the hearing, however, a fact confirmed in a letter to him from Donatelli. When asked why he did not simply advise the court of the situation, Mr. English explained that since Angela Tello had by then been identified as a cooperating witness there was concern for her safety and her family's safety and he did not want to announce in open court (in front of defendants) the fact that she was no longer in a secure treatment facility.

By the time of the January 1997 hearing, Ms. Tello had turned herself in to Judge Blackmer, and it was apparently assumed by both Judge Vazquez and the Tenth Circuit that she was again under the "control" of the U.S. Attorney's office. Part of the assumption evidently stems from the fact that she had received some type of payments from the government. These payments, however, were from the ATF and were made pursuant to Department of Treasury Rules and Procedures; there is no evidence that the U.S. Attorney's office was either consulted about or made aware of these payments.

For unknown reasons, it seems that nearly everyone associated with this case in a judicial or a defense capacity assumes that the U.S. Attorney's office and/or the Department of Justice have some type of "hands-on" control over other agencies of the federal government. While I will be the first

to acknowledge that the Department of Justice is a powerful agency with a definite agenda and with numerous fingers in countless pies, even I cannot attribute to the Department—and certainly not to Mr. English—the omniscience with which others seem willing to credit it (and/or him.) It should also be noted here that the Court did not have the benefit of Mr. English's testimony on this subject, as he was not called as a witness by the government in the proceeding regarding the alleged misrepresentations lest he be disqualified from continuing to prosecute the cases on the basis that he had been called as a witness.

(3) *Obstructing Defense Access to Angela Tello and Threatening Prosecution*

This allegation arose primarily from a conversation between English and Donatelli on July 15, 1996, wherein English supposedly coerced Angela Tello to advise Donatelli not to send Peso Chavez to Seattle to see her and threatened Donatelli with criminal prosecution if he continued with his efforts to contact her.

With respect to this allegation, it is Mr. English's position (which is corroborated by Agent McCall) that when they went to Seattle to see Tello, she was upset that her family had been contacted by the defense and had agreed to meet with Mr. Chavez initially only in an effort to keep him away from her family but was adamant that she did not want to meet with him further. Mr. English advised her that whether or not she chose to meet with the defense was up to her but did not discourage her from doing so. When she remained constant in her position that she wanted no further contact

with Mr. Chavez. English figured that someone had better advise Mr. Donatelli of this fact last the defense go to the unnecessary expense of flying Mr. Chavez to Seattle—which he believed (probably correctly) would annoy not only the defense but also the court.

Both English and McCall state that after speaking with Donatelli, Tello handed the phone to English and went outside for a cigarette. Consequently, while Donntelli seems to believe that the remainder of the conversation was for Tello's benefit, the two persons on Tello's end of the line would dispute that. Obviously, it would be helpful to discuss this with Ms. Tello, but she cannot be located at present (at least not by this office or by APD.) Consequently, all things considered, I would have to say that English and McCall would be in a better position than Donatelli to know whether or not Tello was in the room.

While your complaint states that English then threatened defense attorneys and their investigators with prosecution if they made further efforts to contact Tello, English's recollection of the conversation differs somewhat. What apparently occurred was that he advised Donatelli that witnesses (plural) were complaining of harassment by the defense and that if this continued, he would either have to advise the judge or pursue charges of harassment of a witness (which, I gather, is a crime under federal law.) In fact, I have been provided with copies of FBI reports containing complaints of witnesses regarding alleged harassment by defense investigators. Mr. English was not threatening anyone but was merely relaying the concerns of the witnesses and attempting to get the problem stopped. I would view the

"threat" along the same lines as a demand letter in a civil case (which I am constantly explaining to complainants is simply a statement of what legitimate steps can be taken if one wishes to avoid litigation and is done with that goal in mind.)

Even Martha Minogue (Donatelli's Office Manager who was listening in on the conversation) refers in her July 17, 1996, memorandum to English's mention of witnesses being harassed. She also confirms English's position that he would give Angela Tello Donatelli's phone number in case she changed her mind about speaking with him. This would hardly appear to be the action of someone who was attempting to thwart any contact between the two.

The available evidence simply does not support charges of interference with access to a witness in violation of Rules 16-304(A) and 16-304(F) or burdening a third person in violation of Rule 16-404.

(4) *Violations of Discovery Orders*

I realize that both Judge Vazquaz and the Tenth Circuit found that "the government" was dilatory in providing discovery to the defense, and far be it from me to question the findings of such eminent authorities. Nonetheless, I cannot equate the court's frustration with the slowness of the discovery process in a case of this magnitude involving twenty-two defendants (and their attorneys and investigators) and a host of witnesses, ADP officers, AFT agents, DEA agents, FBI agents, and countless exhibits with intentional

misconduct or "a strategy of dilatoriness, evasion, and outright defiance of court orders designed to hamper the defense" by Mr. English in violation of the Rules of Professional Conduct.

Much of the concern expressed by both Judge Vazquez and the Tenth Circuit is directed at the government's supposed duplicity in concealing and coercing Angela Tello, both of which have been discussed above and will not be reiterated here.

I gather that there were thousands of pages of witness statements, police reports, supplemental reports, evidence tests, photographs, pieces of evidence, video tapes, and what not involved in this case. In her order of February 20, 1997, Judge Vazquez notes (at p. 3) the government's "continued intransigence or carelessness" and goes on to cite as an example that "it is patently unreasonable for the Government to clump thousands of pages of discovery on Defendants with little or no explanation as to what the materials are." I realize that it has been some time since I defended someone in a criminal case, but I certainly can recall occasions where I received at least hundreds of pages of discovery and had to figure out for myself the significance of everything; I do not recall ever having received a catalogue to the discovery and was not even aware that the rules mandated that I should have received one (and cannot now find where they do.) I certainly am not questioning the court's authority to issue whatever discovery orders it wishes, but—quite frankly—it almost would seem that some of these orders would be nearly impossible to follow in a timely (two to five days) fashion.

I am also not clear on what the court might have had in mind when on September 13, 1996, it ordered that the *information* from any interview be provided to the defense within two working days—even if the various agencies involved did not have a report written. It just seems to me to be a bit unreasonable to expect prosecutors to be writing reports of or relaying second-hand information to the defense regarding interviews at which they were not even present and about which they themselves had no written reports. It would also seem to be fraught with potential problems and leave prosecutors open to complaints that they had provided inaccurate information or distorted facts.

Finally, the Tenth Circuit's finding that Mr. English had available the Tello arrest warrant but failed to provide it to defense counsel prior to her deposition and then, at the end, said "Oh look, here it was in my notes all along" is, I gather, to be considered yet another example of his sandbagging scheme. I cannot buy into this, however. Assuming that Judge Vazquez and the Tenth Circuit had before them the transcript of the Tello deposition, they surely noticed that there was no such statement made by Mr. English on the record nor was there any exchange indicating any frustration of either you or Ms. Adrian regarding the warrant. At TR. 16, I.21 Ms. Adrian asks Tello whether there was a warrant and does she have a copy; she responds that she does but does not have it with her. English then advises that the warrant has recently been unsealed and will be provided in the normal course of discovery; no one asks for a copy at this point. (TR. 17, II.7—16.) At the and of Ms. Adrian's questioning, she says she may have additional questions once she has seen

the affidavit. Mr. English at this point apparently called his office and had a copy of the affidavit sent over, since it was needed by the defense; you evidently had a copy of the affidavit during your questioning of her. Consequently, I do not see the problem.

Under the circumstances of this case, it would seem that Mr. English did as much as was humanly possible to comply with the court's discovery orders and facilitate the exchange of information. Any failures on his part to do so in a timely fashion do not appear to have been entirely his fault. I note that no one in this case found that Mr. English or other members of the prosecution had possession of reports or other evidence and intentionally "sat" on these items; the problem was more that the various law enforcement agencies (over which Mr. English has no control) were sometimes less than prompt in preparing reports and/or that too much information was provided at one time without (in the Court's opinion) appropriate explanation. Again, I am not attempting to "overrule" the courts; it is merely that what a judge may find exasperating is not necessarily evidence that one has intentionally failed to expedite litigation, obstructed a party's access to evidence or disobeyed an obligation under procedural rules in violation of the Rules of Professional Conduct.

(5) *Failure to Assure the Presence of a Witness.*

Of all of the allegations against Mr. English, this one is perhaps the most difficult to comprehend—and the most easily dismissed.

According to his own testimony, Officer Esquibel did receive a subpoena from Mr. English and understood that he was still under subpoena in October 1996 but claimed in have received a message from "someone" that he was "not needed in court" (and no message that he would be needed in court on October 28.) Consequently, he went off on an elk hunt and did not get the message to appear until his return from the wilderness on October 28th or 29th. Based upon this, the judge concluded that little or no effort was made to obtain the officer's presence in her court and that Mr. English was at fault for this outrage. Judge Vazquez even complained that had the government but sent a FAX to someone at APD, that department would have been able to reach him (although it is not clear how this would have been accomplished.)

The U.S. Attorney's office, on the other hand, presented argument and testimony that efforts were made prior to October 25 (the paralegal began calling witnesses on October 7th as soon as the order of motions had been determined) and that efforts to reach Officer Esquibel intensified as of the 25th.

The judge apparently believed every word of Officer Esquibel's testimony and none of the government's argument. While I agree that it is important to see a witness who is giving testimony and that Judge Vazquez was certainly in a better position that I to assess the officer's credibility, the ruling makes no sense to me for several reasons. When one considers how difficult it is to get an elk license in this state (there is a lottery, I believe) and the fact even if one is fortunate enough to obtain such a license, it is for a limited period of time (four days only, I am told.) It is not difficult

to understand why Officer Esquibel might have been fairly anxious to use his when he did. If one considers his motivation for not appearing against any motivation Mr. English might have had for inconveniencing the court (which was already annoyed at him) by omitting to make efforts to secure the presence of a necessary witness, I have difficulty concluding that Mr. English had more reason to equivocate than Officer Esquibel. Additionally, given the fact that out of seventy (70) witnesses who were subpoenaed, sixty-nine (69) appeared, I find it highly improbable that the government's effort to secure the presence of its witnesses or of this particular witness were inadequate. Why would an effort be made in sixty-nine instances but not in the seventieth?

The fact that a single witness was either confused or chose to ignore a subpoena for a few days is not sufficient evidence, in my opinion, to establish even a probable cause belief that Mr. English was attempting to obstruct access to evidence or disobey a court's directive.

In conclusion, I would like to mention that I have the greatest respect for Judge Vazquez and for the attorneys assigned to defend these cases. I have no doubt that this was an extremely stressful experience for everyone involved and that levels of frustration and anxiety were high. Nonetheless, the reviewing officer and I simply cannot conclude that Messrs. English and . . . were to blame for this or that either violated the Rules of Professional Conduct. While it is certainly possible that mistakes were made, this would not give rise to a finding of intentional misconduct.

Appendix A

Accordingly, the Disciplinary Board will be taking no further action; but on behalf of the Board, I thank you for bringing this matter to its attention. It is only with such cooperation from attorneys that this office is able to monitor the conduct of attorneys and when necessary, impose the appropriate sanction.

Very truly yours,

s/ Virginia L. Ferrara
Virginia L. Ferrara
Chief Disciplinary Counsel

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO DATED JUNE 3, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CR No. 95-538 MV

UNITED STATES OF AMERICA,

Plaintiff,

v.

CESAR GONZALES, ET AL.,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Government's Motion to Reconsider the Court's April 18, 2001 Order, filed April 30, 2001 **[Doc. No. 2473].** The Court, having considered the motion, relevant law and otherwise being fully informed, finds that the motion is not well taken and will be **denied.**

Defendant did not specify the particular rule of procedure pursuant to which he moved for reconsideration. However, the Tenth Circuit has clearly stated that "regardless of how styled, a motion questioning the correctness of a judgment and timely made within ten days thereof will be treated under

Mule 59(e)." *Dalton v. First Interstate Bank*, 863 F.2d 702, 703 (10th Cir. 1988); *see also Phelps v. Hamilton*, 122 F.3d 1309,1323 (10th Cir. 1997). Because defendant's motion was filed within ten days of this Court's order, Rule 59(e) controls. A motion to alter or amend the judgment pursuant to Rule 59(e) should be granted only "to Correct manifest errors of law or to present newly discovered evidence." *Phelps*, 122 F.3d at 1324 *(quoting Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992)). A motion to reconsider "is not a license for a losing party's attorney to get a 'second bite at the apple' " to make legal arguments that could have been made previously. *Mantle Ranches, Inc. v. U. S. Park Service*, 950 F. Supp. 299, 300 (D. Colo. 1997) (quoting *Johnston v. Cigna Corp.*, 789 F. Supp. 1098, 1101 (D. Colo. 1992)).

The Court finds that the Court's previous Order did not contain any manifest errors of law, nor has the Government presented newly discovered evidence that would entitle him to a reconsideration of the Court's prior ruling. The Government raises several issues, none of which have merit.

The Government argues that this Court's April 18, 2001 Order was a criminal contempt sanction because the words operate as a public censure against the individual Assistant United States Attorney. The Government states: "Any time this court states as an established fact that [the AUSA] intentionally misled this Court or intentionally committed any other misconduct, as it does in its most recent Order, this Court is again publicly censuring [the Government] for conduct he has maintained for four years did not occur," Motion to Reconsider at 8. The Government contends that because the Gonzales case was completed at the time the

April 18, 2001 Order was entered, it could only be considered a criminal contempt sanction. The Government further states that he has never been given an opportunity to defend against allegations of his misconduct.

The Government's argument is premised on an incorrect conclusion. This Court did not sanction the AUSA in its April 18, 2001 Order. In fact, the Court stated that sanctions will not be imposed. The Court's April 18, 2001 Order simply reiterates the background of the case, stating previous findings that were made about the Government's conduct (floor this Court, the Tenth Circuit, and the State Bar) and restates in written form what the Court stated from the bench (to which the Government did not object at the time it was said). The Court did not impose new sanctions or even state new findings, Importantly, the Court did not mention the individuals responsible by name, nor has this, Court ever mentioned the individuals by name in any opinion.

The Court has found that the Government committed misconduct in the course of the *Gonzales* case. The Tenth Circuit upheld that finding. The Government apparently wishes for this Court to reverse its previous findings, as well as those of the Tenth Circuit, in order to exonerate him. The Court decided not to impose sanctions, but it will not, and did not decide to, reverse its previous findings.

The fact that this Court stated in a written Older that the Government committed misconduct does not amount to an imposition of criminal, sanctions. The cases the Government cites are not to the contrary. In fact, they deflate the Government's position. In each of those opinions, the courts chastised the attorney for engaging in misconduct. Not only

is it proper for a court to speak to an attorney in an opinion, in fact, "the task of ensuring that attorneys conduct themselves pursuant to recognized ethical precepts falls primarily upon district courts." *United States v. Modica,* 663 F.2d 1173, 1184 (2nd Cir. 1981).

The Government will be reminded that this Court's initial remedy was to exclude the testimony and statements of the witness rather than sanction him personally. The Government appealed that decision, The Tenth Circuit reversed this Court's remedy, stating that the exclusion of testimony was too harsh, and that this Court could impose sanctions on the individual Government actor. However, the Tenth Circuit upheld this Court's findings that misconduct occurred. The Tenth Circuit cited a range of possible sanctions, including, among other things, allowing the witness to be redeposed by defense at government expense, censuring or fining the government attorneys involved in the misconduct, or recommending disciplinary proceedings against the government attorneys involved. The Court's April 18, 2001 Order was well within the Tenth Circuit's directive. The only argument that can be made that the Order was outside of the Tenth Circuit's instruction is the fact that this Court declined to impose sanctions.

With respect to the argument that the Government never had an opportunity to defend against allegations of its misconduct, the Government is mistaken, He has had numerous opportunities to defend the allegations. The most critical time was during the trial. When the Court issued its first Order on June 13,1997, the Government filed a motion for reconsideration. The Government then appealed this Court's decision to the Tenth Circuit acid thereby had another

opportunity to defend his actions. Most recently, the sanctions hearing was set to determine whether sanctions would be levied against the Government. The Government states that they did not introduce evidence because they "were led to believe no further sanctions of any kind would be imposed." Government's Motion to Reconsider at 15, The Government does not explain the basis for this belief. This Court never intimated that sanctions would not be imposed or led the Government to believe anything. In fact, considering the remand order from the Tenth Circuit and this Court's previous findings, the Court finds it difficult to believe anything but that sanctions would be, and most certainly could be, imposed. The Government states that had it known that the hearing would "operate as a criminal contempt proceeding," it would have insisted upon his right to call witnesses and offer testimony to rebut each of the charges against him, This Court imposed no limitation on the Government's ability to present witnesses nor did it dictate in any way how the hearing was to proceed, The fact that the Government chose to submit a lengthy notebook to the Court rather than call witnesses was his strategic decision.[1]

---

1. Not only did the Government *have* notice of the possibility of sanctions from the Tenth Circuit's remand order and this Court's previous findings, but also from the parties' conversations with Court staff about scheduling the hearing. Initially, both parties called the Court and told them they did not need a hearing. The Court informed, them that it was up to the Court to decide to whether to sanction the Government, and that a hearing would be held. The parties then told the Court that they would like to proceed with the hearing as an informal conference in Chambers. The Court told the parties that the hearing was to proceed in Court, formally, and on the record. The Government was not entitled to believe that this Court would not consider sanctions.

Appendix B

Even if this Court were to consider that criminal sanctions were imposed upon the Government, the Court finds that the sanctions hearing complied with due process under Rule 42. The Government was given notice of the hearing, the *notice* stated the time and place of the hearing, allowed a reasonable time for preparation of the defense, and the notice stated the essential facts constituting the contempt charges. The Government raises for the first time in its Motion to Reconsider that because the contempt charge involved disrespect to this Court, this Court is disqualified from presiding at the hearing. However, F. R. Crim. Proc. 42(b) states that the judge is disqualified from presiding at the hearing "except with defendant's consent." The Government never objected previously to this Court presiding over the sanctions hearing. Therefore, the Government consented, and its argument is without merit.

IT IS THEREFORE ORDERED that the Government's Motion to Reconsider the Court's April 18, 2001 Order, filed April 30, 2001 **[Doc. No. 2473]** is hereby **denied.**

Dated this 3rd day of June, 2001.

s/ Martha Vazquez
MARTHA VAZQUEZ
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO DATED APRIL 18, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CR No. 95-438 MV

UNITED STATES OF AMERICA,

Plaintiff,

v.

CESAR GONZALES, ET AL.,

Defendants.

ORDER

THIS MATTER comes before the Court pursuant to the Tenth Circuit's remand of this Court's Order Granting in Part Defendants' Joint Motion to Dismiss Counts as a Sanction for Government's Use of an Unlawfully Issued Bench Warrant to Coerce the Testimony of Witness Angela Tello, filed June 13, 1997. A hearing was held on January 26, 2001 to determine the appropriate sanctions to be levied against the Government. The Court, having reviewed documents submitted by both parties, the Tenth Circuit's instructions and the arguments of both parties, will not impose sanctions.

Appendix C

BACKGROUND

In this Court's June 13, 1997 Order, this Court suppressed the statement and testimony of witness Angela Tello as a sanction against the Government for issuing, in this Court's view, a patently unconstitutional arrest warrant containing an "escape clause," violating discovery orders of this Court, and misrepresenting the whereabouts of Ms. Tello to the Court and defense counsel. As stated in this Court's Order Denying the Government's Motion to Reconsider that Order, this Court found Ms. Tello's arrest warrant to be a patently unconstitutional, extremely coercive, and facially invalid. The warrant called for the arrest of Ms. Tello for her integral role in the homicide of Patrick Garcia, and charged her with conspiracy to commit murder, accessory to murder, and other felony charges. However, the warrant contained an "escape clause," which allowed Ms. Tello to avoid arrest on these serious charges if she fully cooperated with the Government. This clause was the basis for the Court's conclusion that "[o]n its face, the warrant violates the basic precept of [the] Fifth Amendment—that citizens have a right to be free from self-incrimination," as well as other core principles of the Constitution. June 13 Opinion, at 11. This Court found that "[t]he Government's participation in obtaining and executing this warrant is [so] patently offensive to the dignity of the judicial process and the Government's sworn duty to uphold the Constitution," *id.* at 12, and so extremely coercive, *id.* at 15, that the Court felt obligated to exercise its supervisory powers to "divest [the Government] of the benefit of its unconstitutional conduct, so as to deter it from resorting to similar tactics in the future and to protect the integrity of th[e judicial] proceeding [before the Court]," *id.* at 17.

Appendix C

Lending support to the Court's decision to impose such a severe sanction was the Government's "course of conduct in pursuing this most serious of prosecutions that has forced the Court to issue countless admonitions and lesser sanctions in response to the Government's misconduct," *id.* at 19, as well as misrepresentations made in open court at a hearing on September 4, 1996, by lead Government counsel that interfered with Defendants' court-ordered access to Ms. Tello.

The Tenth Circuit reversed, finding that Ms. Tello's statements were not coerced. However, the Tenth Circuit upheld this Court's finding that the government knowingly and intentionally violated discovery orders and misrepresented Ms. Tello's status and whereabouts to the court and defense counsel. The Tenth Circuit held that this Court should impose less severe sanctions than suppressing Ms. Tello's statements and barring the Government's use of her testimony. The Tenth Circuit suggested that possible sanctions could include, among other things, allowing the witness to be redeposed by defense at government expense, censuring or fining the government attorneys involved in the misconduct, or recommending disciplinary proceedings against the government attorneys involved. Since the issuance of the Tenth Circuit's remand, all of the defendants have pleaded guilty and have been sentenced pursuant to their pleas.

Appendix C

DISCUSSION

On January 26, 2001, this Court held a hearing to determine the appropriate sanctions to be levied against the Government. The Assistant United States Attorney in charge of prosecuting this ease addressed the Court. Mr. Blackburn, the administrative attorney representing the interests of the defendants, also addressed the Court. The Court notes that two Assistant United States Attorneys involved in this case were brought before the Disciplinary Board of the Supreme Court of the State of New Mexico for their conduct in this case. The Board found that there was insufficient evidence to establish a probable cause that the Assistant United States Attorneys violated the Rules of Professional Conduct.

As the Court stated from the bench, this was a very difficult and trying case for everyone involved. However, the fact that this case was very tense and emotional does not absolve those who are entrusted with the power and authority of the State of their responsibilities as Officers of the Court. Armed with the power to deprive people of their liberty, the Government has a duty to ensure justice. The Government is not simply an adversary. The Government's focus should not be to win at all costs, but to advance integrity and fairness in our legal system.

While this Court does not approve of the conduct of the Government in this case, this Court does not wish to prolong this matter any further. Counsel for the defendants did not take a position on the sanctions this Court is to impose. The Assistant United States Attorney has been before the State Disciplinary Board for his conduct in this case, and has

suffered the consequences of his conduct in his community of fellow prosecutors as well as in the defense community. The Court trusts that the Government has learned from this experience, and in future cases will use its power not simply to gain the best advantage, but to make decisions that advance the fairness and integrity expected of those of us entrusted with the awesome power to decide people's lives. Therefore, the Court declines to impose sanctions.

IT IS THEREFORE ORDERED that no sanction shall issue against any Assistant United States Attorney in this case.

Dated this 18th day of April, 2001.

s/ Martha Vazquez
MARTHA VAZQUEZ
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 20, 2003

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 01-2186
(D.C. No. CR-95-538-MV)

UNITED STATES OF AMERICA,

Plaintiff,

v.

CESAR GONZALES, et al.,

Defendants.

THOMAS ENGLISH,

Appellant.

NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS,

Amicus Curiae.

ORDER

Filed August 20, 2003

Appendix D

Before **SEYMOUR, BALDOCK,** and **BRISCOE,** Circuit Judges.

This court's order issued August 19, 2003 is hereby vacated. Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied. Judge Baldock voted to grant the petition for rehearing.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: [illegible]
Deputy Clerk

Supreme Court, U.S.
FILED
DEC 2 3 2003
OFFICE OF THE CLERK

No. 03-735

In The Supreme Court of the United States

THOMAS L. ENGLISH, ESQ.,

Petitioner,

v.

HONORABLE MARTHA VAZQUEZ,
U.S. DISTRICT JUDGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
REASONS FOR GRANTING THE PETITION	2
A. Fairness Demands That Lawyers Have Standing to Appeal Injuries to Their Most Vital Asset – Their Reputation	3
1. Judicial censure damages lawyers' professional reputations beyond measure	3
2. A rule precluding appellate review of written findings of professional misconduct disproportionately damages government attorneys	5
B. The Court Should Take This Opportunity to Resolve a Long-Standing Circuit Split and Create a Uniform Rule Giving Lawyers Standing to Appeal Written Findings of Professional Misconduct	8
1. Majority Approach: Appealable	9
2. Minority Approach 1: Sometimes appealable	10
3. Minority Approach 2: Unappealable	10
4. Inconsistent standards create unfairness and uncertainty	12
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Bolte v. Home Ins. Co., 744 F.2d 572 (7th Cir. 1984).....11

Butler v. Biocore Med. Tech., Inc., ___ F.3d ___, 2003 WL 22481781 (10th Cir. Nov. 4, 2003).....9, 12

Clark Equip. Co. v. Lift Parts MFG. Co., Inc., 972 F.2d 817 (7th Cir. 1992).....11

Committee on Legal Ethics of West Va. Bar v. Roark, 382 S.E.2d 313 (W. Va. 1989) 5

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)..... 3

EEOC v. Datapoint Corp., 457 F. Supp. 62 (W.D. Tex. 1978) 5

FDIC v. Tefken Constr. & Installation Co., 847 F.2d 440 (7th Cir. 1988) 3

Fromson v. Citiplate, 886 F.2d 1300 (Fed. Cir. 1989)..... 9

In re Williams, 156 F.3d 86 (1st Cir. 1998).....6, 10

Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003).....9, 10

Starcher v. Correctional Med. Sys., Inc., 144 F.3d 418 (6th Cir. 1998) 5

Sullivan v. Committee on Admissions and Grievances, 395 F.2d 954 (D.C. Cir. 1967) 9

Thomas v. Capital Security Services, Inc., 836 F.2d 866 (5th Cir. 1988) 3

United States v. Gonzales, 344 F.3d 1036 (10th Cir. 2003).....12

United States v. Isgro, 974 F.2d 1091 (9th Cir. 1992)..... 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Talao, 222 F.3d 1133 (9th Cir. 2000) 6, 10

Walker v. City of Mesquite, 129 F.3d 831 (5th Cir. 1997) ..... *passim*

STATUTES

28 U.S.C. § 1291 11

COURT RULES

SUP. CT. RULE 10 3

SUP. CT. RULE 37 1

OTHER AUTHORITIES

ABA Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 cmt. (1994) 5

Andrew L. Kaufman, *Judicial Ethics: The Less Often Asked Questions*, 64 WASH. L. REV. 851 (1989) 3

NMSA 1978, Rule 17-206(A) 8

Steve Lubet, *Just Who Made Federal Judges God?*, CHIC. TRIB., Aug. 10, 2001 12

United States Attorney's Manual § 1-4.120 8

United States Attorney's Manual § 1-6.100 7

BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Assistant United States Attorneys ("NAAUSA"), *amicus curiae*, respectfully submits this Brief in Support of Petitioner Thomas L. English's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.[1]

Pursuant to Supreme Court Rule 37(2)(a), all parties to this action have given their written consent to the filing of this brief, and copies of the consents are on file with this Court.

STATEMENT OF INTEREST

NAAUSA is a professional, non-profit, non-governmental corporation founded to promote and protect the career and professional interests of Assistant United States Attorneys. NAAUSA serves as a resource for policy makers in the executive and legislative branches and helps educate them with regard to issues that concern NAAUSA's members. Since its incorporation in 1992, NAAUSA has become involved in a number of policy debates affecting the federal law enforcement community, including compensation and pension issues, immunity

[1] Pursuant to Supreme Court Rule 37(6), no part of this brief was authored by counsel for the petitioner, and all monetary contributions for the preparation and submission of this brief have or will come from NAAUSA, except to the extent that counsels' services have been provided *pro bono publico*.

protection for prosecutors and other government attorneys, and federal criminal legislation. Currently, NAAUSA has over 900 members with representatives in every United States Attorney's Office and practicing in every federal circuit. NAAUSA has a strong interest in the resolution of the issue of whether attorneys may appeal final, written orders containing findings of attorney misconduct. Moreover, NAAUSA believes it is in a special position to help this Court understand the importance this issue has to government and public service lawyers, among others.

REASONS FOR GRANTING THE PETITION

Thomas English's reality is every attorney's nightmare. As the Petition ably details, groundless accusations of prosecutorial misconduct triggered a chain of events that publicly ravaged Mr. English's professional reputation and left him without legal recourse. Mr. English, attempted to appeal a district court's specific, written findings of professional misconduct, but the Tenth Circuit dismissed his appeal for lack of standing, concluding that he had not suffered a sanction and therefore demonstrated no legally cognizable injury. That decision represents more than a personal miscarriage of justice for Mr. English; it vividly illustrates a scenario feared by all attorneys practicing before federal courts.

NAAUSA urges this Court to grant certiorari and create a uniform rule allowing appellate review of written judicial findings of attorney misconduct. The Tenth Circuit's decision offends basic notions of due process and fundamental fairness by denying attorneys the right to

appeal injuries to their professional reputations. *See* SUP. CT. RULE 10(a). Moreover, Mr. English's case presents an opportunity to resolve a profound circuit split. *See id.* Seven Circuits have addressed this issue, and three distinctly different approaches have emerged. Consequently, the ability to appeal a written finding of professional misconduct is a matter of geography rather than a matter of right. The resulting uncertainty harms lawyers and judges alike, and this Court should use this case as a vehicle to create a much-needed consistent rule.

A. Fairness Demands That Lawyers Have Standing to Appeal Injuries to Their Most Vital Asset – Their Reputation.

1. Judicial censure damages lawyers' professional reputations beyond measure.

The Tenth Circuit ignored the reality of the legal profession when it concluded that Mr. English was not injured by the district court's written finding of professional misconduct. In fact, lawyers' "most precious asset is their professional reputation." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part and dissenting in part); *see also Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997) (stating "one's professional reputation is a lawyer's most important and valuable asset."). And because "[a] lawyer's reputation for integrity, thoroughness, and competence is his or her bread and butter," *FDIC v. Tefken Constr. & Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988), "criticism delivered from the bench . . . can . . . damage a lawyer's reputation and career." *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 878 (5th Cir. 1988); *see also* Andrew L. Kaufman, *Judicial Ethics: The Less Often Asked Questions*, 64 WASH.

L. REV. 851, 864 (1989) ("Public criticism of a lawyer in an opinion . . . may destroy or severely damage a lawyer's reputation.").

Technological innovations in legal research increase the damage done by a written reprimand from the bench. Databases like Westlaw and Lexis make court opinions and orders widely available and easily searchable. Prospective employers, other judges, or opposing counsel can dredge up past rebukes simply by searching for an attorney's name on a legal search engine. Unlike a simple monetary sanction that is paid and finished, written findings of professional misconduct permanently injure attorneys by staining their reputations.

The case at bar illustrates the corrosive effect of a written censure. Mr. English was one of four candidates for United States Attorney that U.S. Senator Pete Domenici submitted to the White House. *See* Petition for Writ of Certiorari at 12 n.5. His nomination was the culmination of a lifetime of service. *Id.* Unfortunately, the district court issued its public criticism of Mr. English while his nomination was being considered. *Id.* While it is impossible to say whether Mr. English would have secured the position if he had not been sanctioned, it is safe to say that the district court's rebuke lessened his chances.

Written criticism of an attorney's professional acumen or integrity, then, constitutes a legally cognizable injury because it does both immediate and long-term damage to an attorney's career. *See United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992) (recognizing that "published opinions chastising" counsel constitute a "serious sanction"). Consequently, principles of due process and fundamental fairness demand that a written finding of

professional misconduct confer standing to appeal. *See Walker*, 129 F.3d at 832 (rejecting "out of hand" the argument that an attorney lacked standing to appeal the court's declaration that he engaged in blatant misconduct); *see also* ABA Comm. on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.10 cmt. at 18 (1994) (stating that the right to appeal an adverse determination is "a fundamental element of procedural fairness as generally understood in this country").

2. A rule precluding appellate review of written findings of professional misconduct disproportionately damages government attorneys.

The Tenth Circuit's decision particularly concerns NAAUSA because the consequences of a rule precluding appeals from written findings of attorney misconduct fall disproportionately on attorneys employed by the government. Anecdotally, NAAUSA's membership reports that making allegations of misconduct against government attorneys has emerged as a routine litigation tactic used to procure default judgments, preclude witness testimony, or obtain other strategic advantages. *Cf. Starcher v. Correctional Med. Sys., Inc.*, 144 F.3d 418, 425 (6th Cir. 1998) ("requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses"). At the same time, courts frequently hold government attorneys to a more rigorous standard of competence and ethical probity than a similarly situated private attorney. *See, e.g., Committee on Legal Ethics of West Va. Bar v. Roark*, 382 S.E.2d 313, 318 (W. Va. 1989) ("courts have uniformly viewed the [government] lawyer's misconduct as more egregious because of the betrayal of the public trust attached to the office"); *EEOC v. Datapoint*

Corp., 457 F. Supp. 62, 63 (W.D. Tex. 1978) ("Because of the peculiar power of the government litigator, he is subject to ethical considerations beyond the ordinary litigator."). The trend towards using accusations of misconduct as a litigation tactic, coupled with courts' efforts to police government misconduct, puts government attorneys at a higher risk for suffering an undeserved sanction.

Because sanctions against government attorneys often take the form of a written rebuke, the Tenth Circuit's decision also means that government attorneys face a higher risk of suffering an undeserved and *unappealable* sanction. Many judges realize that government attorneys are salaried workers whose advocacy and heavy caseloads are not driven by pecuniary interests. Consequently, judges often choose to sanction a government attorney with a written censure rather than a monetary fine. *See, e.g.*, *United States v. Talao*, 222 F.3d 1133, 1136 (9th Cir. 2000) (involving a district court's written finding of a government attorney's professional misconduct); *In re Williams*, 156 F.3d 86, 88 (1st Cir. 1998) (same). Thus, while a private practitioner may receive and appeal a $100 fine, his governmental counterpart all too often receives an undeserved written censure of his professional conduct that leaves him with no legal recourse. *Walker*, 129 F.3d at 832.

Additionally, government attorneys cannot avoid written professional censure by taking preventative steps in the same way that private practitioners can. A private attorney can reduce the chances of receiving such a rebuke by refusing to take a case that requires him or her to appear in a court that is prone to give them or by charging the client a higher fee to compensate for the risk to his or

her reputation. Neither is an option for a government attorney.

Moreover, government attorneys face special difficulties defending themselves against such judicial censure. For example, a government attorney must obtain permission from the Department of Justice in order testify on his own behalf. *See* United States Attorney's Manual Secton 1-6.100 (noting that "no present or former employee of the Department of Justice may testify ... in response to subpoenas or demands of courts or other authorities issued in any state or federal proceeding without obtaining prior approval by an appropriate Department official" when that testimony relates to "[a]ny information acquired by an employee of the Department as a part of the performance of that employee's official duties"). As this case demonstrates, the government hesitates to grant permission because it fears that the government attorney will be unable to continue working on the case if he or she becomes a witness. As the Petition notes, Mr. English requested leave to testify on his own behalf and attempt to set the record straight about his conduct, in the hopes of avoiding the imposition of sanctions, but the government refused to allow him to do so. *See* Petition for Writ of Certiorari at 6. Because their position as government attorneys often hampers their efforts to defend themselves against accusations of professional misconduct at the trial court level, government attorneys are unfairly and disproportionately impacted by a rule prohibiting appeals from written findings of professional misconduct.

The inability to appeal written findings of professional misconduct spells disaster for the careers of government attorneys. A written rebuke has immediate negative

consequences for a government attorney because it triggers further internal investigation and disciplinary action. All Department of Justice attorneys, for example, must report to their supervisors any "statements by a judge or magistrate indicating that misconduct by a Department employee has occurred." *See* United States Attorney's Manual Section 1-4.120(A). In addition, Department of Justice lawyers must immediately report a finding of misconduct to the Department of Justice Office of Professional Responsibility. *See id.* at 1-4.120(B). The ensuing internal investigations may result in the attorney being terminated or disbarred. *See* NMSA 1978, Rule 17-206(A) (Rules Governing Discipline).

While government attorneys should be – and are – held to the highest professional and ethical standards, public service to the United States should not carry with it an unfair risk of incurring an unappealable decision that permanently damages the attorney's reputation for professionalism and integrity. This Court can eliminate this fundamental unfairness by establishing a clear rule allowing appeals from written findings of professional misconduct.

B. The Court Should Take This Opportunity to Resolve a Long-Standing Circuit Split and Create a Uniform Rule Giving Lawyers Standing to Appeal Written Findings of Professional Misconduct.

Given the damage a written rebuke of professional conduct does to a lawyer's career, the ability to appeal it should be a matter of right, but, as it stands, it is a matter of geography. An acknowledged and profound circuit split exists on whether a court's written finding of attorney misconduct may be appealed when it is not labeled a

"sanction" and no monetary penalty accompanies it. Seven circuits have considered the issue, and three distinct approaches have emerged.

1. Majority Approach: Appealable.

The majority approach allows attorneys to appeal written findings of professional misconduct, regardless of how the findings are labeled or whether they are accompanied by a fine. The Fifth, Federal, and District of Columbia Circuits adopt this approach. *See Precision Specialty Metals, Inc. v. United States*, 315 F.3d 134, 1346 (Fed. Cir. 2003) (characterizing a reprimand of an attorney's conduct in an *unpublished* opinion as a "sanction" and acknowledging the propriety of appellate review); *Walker*, 129 F.3d at 832-33 (allowing an attorney to appeal an *unpublished* finding that he violated his obligation of candor and rejecting "out of hand" the argument that monetary damages are a necessary prerequisite for appellate jurisdiction); *Fromson v. Citiplate*, 886 F.2d 1300, 1304 (Fed. Cir. 1989) (allowing an attorney to appeal from an opinion that "commented unfavorably" on his conduct and characterizing the comment as "a sanction"); *Sullivan v. Committee on Admissions and Grievances*, 395 F.2d 954, 956 (D.C. Cir. 1967) (concluding that a determination that an attorney "was guilty of proscribed conduct" gave "him standing to appeal"). Shortly after the decision at issue in this case, the Tenth Circuit adopted the majority approach as well. *See Butler v. Biocore Med. Tech., Inc.*, __ F.3d __, 2003 WL 22481781 (10th Cir. Nov. 4, 2003) (page numbers unavailable) (holding that "an order . . . affecting an attorney's professional reputation imposes a legally sufficient injury to support appellate jurisdiction"). These

courts correctly reason that "the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a prerequisite for the appeal of a court order finding professional misconduct." *Walker*, 129 F.3d at 833; *see also Precision*, 315 F.3d at 1346; *Sullivan*, 395 F.2d at 954, 956.

2. Minority Approach 1: Sometimes appealable.

A minority approach gives lawyers standing to appeal when the rebuke at issue satisfies specific criteria, though the relevant criteria are not the same for all the courts following this approach. The First Circuit falls into this category and allows attorneys to appeal orders damaging their professional reputations only when the challenged order is "expressly identified as a reprimand." *Williams*, 156 F.3d at 92. Similarly, the Ninth Circuit falls into this category, but uses different criteria. The Ninth Circuit allows attorneys to appeal from orders that are "inordinately injurious to a lawyer's reputation" but does not allow appeals from orders that amount to mere "routine judicial commentary." *Talao*, 222 F.3d at 1137. The Ninth Circuit considers an order "inordinately injurious" when it concludes that an attorney knowingly and willfully violated an ethical rule. *Id.* at 1337-38. This minority approach exalts form over substance and puts arbitrary parameters on an attorney's right to appeal damaging rebukes.

3. Minority Approach 2: Unappealable.

Another minority approach concludes that an attorney can never appeal a written finding of professional

misconduct in the absence of a monetary sanction. The Seventh Circuit alone follows this approach. *See Clark Equip. Co. v. Lift Parts MFG. Co., Inc.*, 972 F.2d 817, 820 (7th Cir. 1992) ("[A]n attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects."); *see also Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984). In *Bolte*, the Seventh Circuit recognized the potential harm that a rebuke can do to an attorney's professional reputation, but balanced this potential harm against perceived practical concerns such as "congested appellate dockets and . . . the difficulty of assuring an adversary contest in most such appeals." *Bolte*, 744 F.2d at 572-73. As a result of this balancing test, the court concluded that written findings of misconduct are not final decisions, determining that "Congress, in making 'final decisions' of district courts appealable in 28 U.S.C. § 1291" did not mean "to allow people who were not even parties to a lawsuit in the district court to appeal from a wounding or critical or even palpably injurious comment or finding by a district judge." *Id.* at 573. In reaching the opposite conclusion, the Fifth Circuit aptly criticized the Seventh Circuit's reasoning as unfair and unrealistic: "stripped to its essentials [the Seventh Circuit approach] would maintain that an attorney has more of a reason and interest in appealing the imposition of a $100 fine than appealing a finding and declaration by a court that counsel is an unprofessional lawyer prone to engage in blatant misconduct." *Walker*, 129 F.3d at 832.

As a consequence of the minority approaches, district judges can use their bully pulpit to tarnish a lawyer's reputation without the prospect of appellate review by criticizing the lawyer without labeling the order as a

"sanction" or imposing a monetary fine. *See* Steve Lubet, *Just Who Made Federal Judges God?*, CHIC. TRIB., Aug. 10, 2001, at 23.

4. Inconsistent standards create unfairness and uncertainty.

As Petitioner English points out, "[i]t is ironic that the profession charged with protecting due process rights has not achieved a fair standard for itself in this area." Petition for Writ of Certiorari at 14. Indeed, it is more than ironic; the absence of a consistent standard on this issue is fundamentally unfair to every attorney practicing before federal courts. Due process demands that every attorney – everywhere – have the right to appeal a written finding of professional misconduct.

Mr. English's case, in particular, vividly illustrates the pressing need for a uniform rule because it reveals that an attorney's access to appellate review hinges not only on which circuit court decides the issue, but also on *when* a circuit court decides the issue. The Tenth Circuit dismissed Mr. English's appeal for lack of standing over a vigorous dissent. *See United States v. Gonzales*, 344 F.3d 1036 (10th Cir. 2003). A few months later, however, the Tenth Circuit adopted the dissent's view and allowed a different attorney to appeal findings of misconduct made against him. *See Butler*, 2003 WL 22481781. This change came too late to help Mr. English, however, and demonstrates the unjust and very personal consequences suffered by attorneys around the nation due to the absence of a single, controlling decision on this issue.

Moreover, uncertainty about the availability of appellate review threatens to chill zealous advocacy. There is an

inherent tension between the threat of sanctions and zealous representation, and the availability of appellate review of sanctions plays a key role in maintaining the proper balance. The balance becomes badly skewed when the right to appeal is uncertain, as it is with written findings of attorney misconduct, and a lawyer's professional reputation can be summarily destroyed by the finding of a trial judge with no possibility of appeal. As a result, attorneys may be less inclined to pursue their clients' positions to the fullest extent of the law.

A consistent standard for the availability of appellate review would also benefit federal judges. A rule making clear, for example, that a court's written findings of attorney misconduct are appealable, while oral statements made in the courtroom are not, would helpfully clarify the nature and consequences of the alternative means available to federal judges for punishing attorney misconduct.

In sum, the ability to obtain judicial review of a published opinion condemning "a lawyer's most valuable asset," *Walker*, 129 F.3d at 832, simply should not depend on the geographic location of the federal court issuing the opinion or the month in which the federal court issued the opinion. The uncertainty surrounding this issue harms both attorneys and judges and – as Mr. English's case demonstrates – allows miscarriages of justice. Consequently, this Court should grant Mr. English's petition and provide a much-needed uniform rule.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, the National

Association of Assistant United States Attorneys, *amicus curiae*, respectfully submits that Mr. English's petition should be granted.

Respectfully submitted,

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